Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEARS, ROEBUCK AND CO.,
Petitioner,

v.

NEWPORT LIMITED, a Partnership in Commendam,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit may, in conflict with the recent decision of this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S.Ct. 2786 (1993), other decisions of this Court, and decisions of other circuits, ignore the district court's performance of its gatekeeper function in ruling that expert opinion proffered in opposition to a summary judgment motion lacked any evidentiary foundation and, instead, hold that all issues of expert credibility and reliability are jury issues?

Whether the United States Court of Appeals for the Fifth Circuit improperly ruled, in effect, that a federal court of appeals reviewing a grant of summary judgment may speculate as to evidence the opposing party might hypothetically offer at a subsequent trial, rather than limiting itself to the evidence actually proffered in opposition to the motion for summary judgment?

LIST OF PARTIES

The parties are listed in the caption. The nonwholly owned subsidiaries of petitioner, Sears, Roebuck and Co., are:

Sears Canada Inc.
Sear, Roebuck de Mexico, S.A.
Sears, Roebuck Pty. Limited (Australia)
MaxServe, Inc.
Prodigy Services
Tires Plus Co.

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NEWPORT LIMITED, a Partnership in Commendam,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Sears, Roebuck and Co. ("Sears") respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered on October 29, 1993, and amended on January 28, 1994. The Fifth Circuit reversed a decision of the United States District Court for the Eastern District of Louisiana which had granted petitioner's motion for summary judgment. Sears' petition for rehearing and suggestion for rehearing *en banc* were denied on February 1, 1994.

OPINION BELOW

The opinion of the Fifth Circuit is officially reported as *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058 (1993), *reh'g denied*, 15 F.3d 1081 (5th Cir. 1994). The court entered its opinion on October 29, 1993, but

amended it on January 28, 1994, while Sears' petition for rehearing and suggestion for rehearing *en banc* were pending. 1a; 23a.[1] The amendment consists of a "correction" to the last page of the opinion which is reprinted in the appendix to this petition, commencing at page 23a. The district court's order and reasons granting petitioner's motion for summary judgment is not reported. 25a.

JURISDICTION OF THIS COURT

Judgment was entered by the Court of Appeals for the Fifth Circuit on October 29, 1993. 1a. That opinion was amended on January 28, 1994. Petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on February 1, 1994. 56a. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

FEDERAL RULE OF EVIDENCE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FEDERAL RULE OF EVIDENCE 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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[1] References to "——a" are to the Appendix submitted with this Petition.

STATEMENT OF THE CASE

Newport Limited ("Newport") first filed its complaint in June of 1986, alleging causes of action under Louisiana state law for bad faith breach of obligations (La. Civ. Code art. 1997), detrimental reliance (La. Civ. Code art. 1967), fraud (La. Civ. Code art. 1953), and unfair trade practices (La. R.S. 51:1509). Newport alleged jurisdiction under the diversity statute, 28 U.S.C. § 1332.

In October of 1988, Newport amended its complaint to add claims for negligent misrepresentation (La. Civ. Code art. 2315) and violation of the Racketeer Influenced and Corrupt Organization Act ("RICO") (18 U.S.C. § 1961 *et seq.*) Defendant, Sears, Roebuck and Co. ("Sears"), moved to dismiss the civil RICO claim in November 1988 pursuant to Federal Rule of Civil Procedure 12(b)(6). Additionally, Sears moved for summary judgment on Newport's state law claims.

In May 1990, the district court dismissed the civil RICO claim on the merits and also dismissed, without prejudice, the pendent state law claims, noting an identity between Sears' state of incorporation and the domicile of one of Newport's several limited partners which defeated diversity of citizenship. Newport and Sears both appealed. The Fifth Circuit affirmed the finding of incomplete diversity and the dismissal of the civil RICO claim. *Newport Limited v. Sears Roebuck and Co.*, 941 F.2d 302, 308 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1175 (1992). The Fifth Circuit also held, however, that the district court had improperly abstained from exercising pendent jurisdiction and remanded the matter to the district court. *Newport*, 941 F.2d at 308. This Court denied Newport's petition for certiorari. *Newport*, 112 S.Ct. 1175 (1992).

Sears then renewed its motion for summary judgment on the state law claims. The district court granted Sears' Motion on September 9, 1992. (25a) The district court held, *inter alia*, that

> even assuming, arguendo, that liability could be imposed by any one of the asserted causes of action, the court is hardpressed to find the evidence of damages alleged; indeed, such claims find no viable support in the record.

52a. The district court further held that it could not

> ignore a duty imposed on it by law to require proof—direct or circumstantial, —but at least *some* proof—of alleged damages.

53a. (Emphasis in original.)

The only evidence proffered by Newport in support of damages took the form of letters written by its putative damages expert. 53a. These letters provided no substantiation or documentation for the opinions asserted therein. *Id.* Newport also offered excerpts from its putative expert's deposition regarding his damage calculations, but offered no evidence to substantiate that his calculations were limited to damages allegedly derived from Sears' conduct at issue. *Id.* The district court thus held that Newport failed to present evidence, "to at least some reasonable degree of certainty," that the damages claimed were caused by Sears or that any alleged damage was quantifiable. *Id.*

The Fifth Circuit recognized that Newport's only evidence regarding damages in response to Sears's motion for summary judgment was that of its expert witness. The Fifth Circuit, however, did not even address—much less dispute—the district court's finding *that none of Newport's damages evidence was viable.* Indeed, the Fifth Circuit agreed that the proffered evidence was "thin." Nevertheless, the court held that "it ordinarily is the province of the jury to gauge the expert witnesses [sic] credibility and the reliability of his data." *Newport*, 6 F.3d at 1069, as "corrected" on January 28, 1994. 22a; 24a. Thus, the Fifth Circuit reversed the summary judg-

ment, holding that Newport raised a genuine issue of material fact as to damages.

Following the Fifth Circuit's initial opinion, issued October 29, 1993, Sears petitioned for panel rehearing and also suggested rehearing *en banc*. In its suggestion for rehearing *en banc*, Sears pointed out that the district court had specifically held that Newport failed to lay the requisite foundation for the expert evidence offered on summary judgment and that none of Newport's damages "evidence" was viable. Sears also noted that the Fifth Circuit incorrectly stated the law to be that, irrespective of the issue of admissibility, "[o]rdinarily, it is the province of the jury to gauge the credibility of an expert witness and the reliability of the expert's data." In support, Sears pointed to the district court's holding that the "opinion" of Newport's expert lacked the requisite foundation and could not properly be considered in opposition to the motion for summary judgment.

After Sears filed its petition for rehearing and suggestion for rehearing *en banc*, but before they were denied, the Fifth Circuit took the highly unusual step of altering its published opinion. 23a. Thus, the Fifth Circuit "corrected" its published opinion to now state that the district court had not held Newport's expert evidence in general to be inadmissible. However, this "correction" clearly made in response to Sears' petition and suggestion, is unsupported by analysis of the district court's evidentiary rulings on the lack of damages evidence in opposition to Sears' summary judgment motion. Further, the "correction" ignores the fact that the district court had properly performed its gatekeeper function, holding that the expert evidence proffered by Newport provided no viable support for Newport's damage claims. The Fifth Circuit's ruling thus stands in sharp conflict with the decisions of this Court and other circuits.

REASONS FOR GRANTING THE WRIT

I. COURTS MUST FIRST DETERMINE WHETHER EXPERT EVIDENCE PROFFERED IN RESPONSE TO A MOTION FOR SUMMARY JUDGMENT IS ADMISSIBLE BEFORE DETERMINING WHETHER SUCH EVIDENCE CREATES A GENUINE ISSUE OF MATERIAL FACT.

This Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 125 L.Ed. 2d 469, 113 S.Ct. 2786 (1993), that a district court reviewing expert evidence proffered in response to a motion for summary judgment must make a threshold determination regarding the admissibility of the proffered evidence. "[T]o be considered in a motion for summary judgment, the testimony must be admissible." *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612 (7th Cir. 1993). A party may offer expert opinion testimony *only* where "technical or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue. . . ." *Daubert*, 113 S.Ct. at 2795. (Emphasis supplied.) Moreover, this Court observed in *Daubert* that " 'knowledge' " connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.' " *Id.* at 2795 (quoting Webster's Third New International Dictionary, p. 1252 (1986)).

Assuming that the use of expert evidence is warranted, a district court is charged with determining whether the reasoning upon which the proffered opinion is based is "of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject." *Id.* at 2795. In other words, the district court functions as the gatekeeper, insuring that any expert evidence which is ultimately admitted is "knowledge"—not merely unsupported speculation. *Daubert* specifically admonishes that "the Rules of Evidence—especially Rule 702—do assign

the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 2799. The Seventh Circuit recently applied *Daubert* and held that expert testimony "based on subjective belief alone . . . was properly excluded under *Daubert*." *Porter*, 9 F.3d at 615. However, in stark contrast, the Fifth Circuit here flatly ignored *Daubert*'s mandate of a district court's responsibilities. In plain violation of *Daubert*, it held that all questions of the reliability of expert opinions are for the jury alone. 22a.

II. THE FIFTH CIRCUIT ABUSED ITS DISCRETION IN VIOLATION OF *DAUBERT* BY FAILING TO CONSIDER THE DISTRICT COURT'S EVIDENTIARY RULINGS.

The question on summary judgment is not whether the responding party can ever, under any circumstance, present a genuine issue of material fact. This Court has specifically and repeatedly held that a party opposing summary judgment may not rest upon mere allegations but must set forth specific facts showing a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]here must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. "Thus, before a district court may consider expert opinion evidence set forth in an affidavit or other evidentiary document offered in support of or in opposition to a motion for summary judgment, the court must find, among other things, that that evidence meets the requirements of Federal Rule of Evidence 702, namely, that the person who provided the evidence is 'qualified as an expert by knowledge, skill, experience, training, or education.'" *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 176 (5th Cir. 1990).

To the extent that a district court's decision to grant or deny summary judgment necessarily depends upon the admissibility of evidence offered to support or refute the motion, review of that decision is a two-tiered process. The reviewing court must first review the trial court's

evidentiary rulings under the manifest error standard. *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993). "[T]he issue of the admissibility of an expert's affidavit is distinct from the issue of whether the affidavit is sufficient to withstand a summary judgment motion." *Monks v. General Electric Co.*, 919 F.2d 1189, 1192-1193 (6th Cir. 1990); *Bieghler v. Kleppe*, 633 F.2d 531, 533-534 (9th Cir. 1980). Then, "[a]t the second level, with the record defined, we review the trial court's summary judgment decision *de novo*." *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991).

One distinct basis for the district court's grant of summary judgment here was its finding that Newport failed to offer ". . . at least *some* proof—of alleged damages. This Court will not leave such determination to a jury for speculation and conjecture." 53a. (Emphasis in original.) The only damages evidence proffered by Newport consisted of two one-paragraph letters from Newport's expert stating his opinion as to the damages allegedly sustained, and the district court ruled that these letters were devoid of anything which would reflect the process by which the expert reached his subjective relief. Moreover, the deposition testimony of the putative expert failed to substantiate that the damage calculations were limited to or derivative of Sears' actions. Such putative expert "evidence" is inadmissible under *Daubert*. *Porter*, 9 F.3d at 615.

The district court's unequivocal holding that Newport's damage claims thus found "no viable support in the record" means that it necessarily found the evidence offered by Newport to be inadmissible in substance. 52a. *See Benavides v. County of Wilson*, 955 F.2d 918, 971 (5th Cir. 1992). Obviously, the district court determined that the proffered evidence did not rest upon a reliable foundation and/or failed to provide any basis upon which to gauge the foundation of that evidence. *See Benavides*, 955 F.2d at 971. "Without more than credentials and a

subjective opinion, an expert's opinion that 'it is so' is not admissible." *Id.* at 973 (quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987)). As *Daubert* confirms, expert testimony that is pure speculation is not admissible. *See, Benavides*, 955 F.2d at 973. That is exactly what the district court held here.

But the Fifth Circuit, in an abuse of its discretion and in violation of the decisions of this Court and other circuits, refused to acknowledge the district court's ruling on the inadmissibility of Newport's proffered expert evidence. While it agreed, as it had to, that Newport's proffered damage evidence was "admittedly thin," 22a, the Fifth Circuit failed to address, much less disagree with, the district court's evidentiary ruling. The import of the Fifth Circuit's refusal to address the district court's evidentiary ruling is patent and grave. In a case such as this one—and there will be many more such cases—where "the contested evidence is essential to the cause of action and the trial court has excluded the evidence, we may decide the appeal at the first level solely on the basis of the soundness of the evidentiary ruling. For if we uphold the exclusion of essential evidence, the second level inquiry becomes academic." *Christophersen*, 939 F.2d at 1109. Here, however, the Fifth Circuit inexplicably refused to even acknowledge the issue.

III. THE FIFTH CIRCUIT ERRONEOUSLY BASED ITS REVERSAL OF SUMMARY JUDGMENT ON THE HYPOTHETICAL POSSIBILITY THAT PLAINTIFF, AT TRIAL, MIGHT OFFER EVIDENCE NOT PROFFERED IN RESPONSE TO SEARS' SUMMARY JUDGMENT MOTION.

In clear departure from established precedent of this Court and the circuits, the Fifth Circuit reversed a summary judgment, in effect, on the basis of hypothetical expert evidence which might—possibly, but certainly not necessarily—be offered at a subsequent trial. In other words, the substantive premise for the Fifth Circuit's re-

versal was not the evidence which was *actually* presented in opposition to summary judgment, but undefined evidence Newport *might* offer at some later date.

In its petition for rehearing and suggestion for rehearing *en banc*, Sears pointed out that the district court had held that Newport's proffered evidence on damages was inadmissible. In what can only be an "unofficial" response to Sears' petition and suggestion, the Fifth Circuit then stated, by means of "correction", that "[w]here, as here, the district court has not excluded expert evidence as inadmissible, it ordinarily is the province of the jury to gauge the expert witnesses [sic] credibility and the reliability of his data." [2] 24a.

But the Fifth Circuit did not and could not hold that the district court's ruling—that the damages evidence actually offered by Newport in opposition to the summary judgment motion was inadmissible—constituted manifest error. Essentially, it just ignored the ruling. Of course, the district court did not rule that plaintiff's expert would not be permitted to testify at trial. It never addressed that issue because it was irrelevant. What the district court did rule was that that the "evidence" proffered by Newport in response to Sears' motion for summary judgment was inadequate, unfounded, and, accordingly, inadmissible. In this regard, the district court properly performed its gatekeeper function, excluding from evidence expert opinion that was pure speculation. *See Benavides*, 955 F.2d at 973. The Fifth Circuit never even acknowledged, much less disputed, that finding, an analysis clearly required by *Daubert*. That is why the "correction" is so disingenuous and dangerous.

Daubert, Porter, Benavides, Christophersen, and many other cases constrained the district court, on summary judgment, to determine whether the expert evidence offered in opposition to the summary judgment motion met

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[2] The "correction" added "[w]here, as here, the district court has not excluded expert evidence as inadmissible. . . ." 24a.

the requirements of the Federal Rules of Evidence. "[A] mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990). In sweeping disregard of this settled law, the Fifth Circuit unilaterally abrogated that rule, and Sears respectfully submits that this Court should not permit its rulings in *Daubert* and *Liberty Lobby* to be so flagrantly ignored and disobeyed.

CONCLUSION

For each and all of the reasons set forth above, Petitioner respectfully requests this Court to issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3832

NEWPORT LIMITED, a Partnership in Commendam,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK & COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Oct. 29, 1993

Before KING, HIGGINBOTHAM, and DEMOSS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case appears before the Fifth Circuit for the second time. In 1990, the district court granted summary judgment for Sears, Roebuck and Co., on Newport Limited's civil RICO claim and dismissed Newport's pendent state law claims. We affirmed the RICO decision, but instructed the trial court to rule on the pendent claims given the advanced state of the litigation. On remand, the

court granted summary judgment on Newport's state law claims as well. We REVERSE the district court order granting summary judgment and REMAND for further proceedings.

I

As Newport appeals from summary judgment, we view the evidence in the light most favorable to Newport. Barrett Computer Services, Inc. v. PDA, Inc., 884 F.2d 214, 216 (5th Cir.1989).

Newport owns approximately 700 acres at the intersection of the Mississippi River-Gulf Outlet and the Gulf Intracoastal Waterway in Orleans Parish. In the early 1980's, Newport began efforts to develop the property into an industrial park. In May 1983, Sears' subsidiary Coldwell Banker contacted Newport to discuss locating an import distribution facility at the site. Sears had several warehouse and distribution centers scattered around New Orleans, and was interested in consolidating them if that would result in savings.

Upon Sears' suggestion, Newport retained Goldman, Sachs & Co. to assist in preparing its proposal. On September 22, 1982, Newport presented a package outlining plans for the proposed distribution center. The proposal's price and terms were based upon the outlined specifications, but Newport invited "Sears [to] make whatever changes to the existing design it considered desirable. If the design changes result in cost differences . . . the lease rates will be adjusted accordingly." The proposal specified that the lease rates would be adjusted according to a formula devised by Goldman Sachs and previously used for a Sears facility in Texas.

In December 1983, Sears officials met with Newport to examine the proposal. A member of Sears' site selection committee stated that Sears had determined that an import distribution center was feasible and should be located in New Orleans. A Sears financial analyst acknowledged the Goldman Sachs formula and noted that

Sears could calculate the rent during development by entering construction costs into the formula.

Sears then requested design changes. In February 1984, Newport submitted a revised proposal incorporating those changes. Newport calculated the rent to be $2.26 per square foot per year. Upon receiving the revisions, Sears reviewed the rent calculations and discovered that Newport had made an error. According to the formula, Sears confirmed that the correct rent for the revised proposal would be $2.48 per square foot per year.

Sears' interest in the Newport site depended upon its designation as a Foreign Trade Zone. Sears also insisted upon infrastructure improveemnts including better road access. Newport sought these prerequisites from the necessary governmental agencies. By March 1984, Newport found that its negotiations with government agencies could not proceed without a commitment from Sears. On March 15, 1984, representatives of Sears and Newport met to review the proposal. Newport informed Sears that a firm commitment was necessary to accomplish the desired improvements and to establish trade zone status. Recognizing this need, Sears decided to review the project thoroughly and make a final decision.

By August 1984, Sears completed a detailed study of the project. This study recommended locating a 650,000 square foot import distribution center at Newport's site. A separate Sears' review had previously concluded that the annual rent for the equivalent warehouse space, scattered about New Orleans, would total $3.92 per square foot. The review included Newport's proposed $2.48 rent and noted that foreseeable construction cost escalations of $1 million would increase the rent to $2.73. The review estimated that a consolidated center in a foreign trade zone at Newport's idustrial park would produce an annual savings of over a million dollars.

Sears executives approved the 25-year lease of a 650,000 square foot facility to consolidate New Orleans import

distribution operations. On October 16, 1984, Sears informed Newport of approval to construct the facility at Newport's site. Sears' personnel were to define the plans and specifications. Soon after, Sears formally advised the City of New Orleans of its decision to locate at Newport. The City then publicized this decision.

In November 1984, Sears informed Newport that new specifications, upgrading the proposed building, were forthcoming. Relying upon Sears' good faith and the announced decision, Newport commenced development. It retained consultants and initiated detailed discussions with City, State, and Federal agencies, to gain approval for the trade zone status and infrastructure improvements Sears requested.

As part of these efforts, Newport pursued an Urban Dvelopment Action Grant from the United States Department of Housing and Urban Development. This Grant would subsidize the City's infrastructure improvements. To assist in obtaining the Grant, Newport requested evidence of Sears' commitment. In November 30, 1984, Sears' territorial real estate manager wrote a letter expressing Sears' intention to enter into a build-to-suit transaction with Newport. This letter had been reviewed and revised by Charles Houk, an in-house attorney working on the transaction for Sears.

The November 30 letter did not satisfy HUD officials because it left uncertain Sears' commitment to carry out the project. Newport requested written evidence of Sears' firm commitment. Newport informed Sears' counsel Houk that the necessary document must demonstrate actual commitment by Sears to the Newport project. Newport sent Sears a proposed agreement, with a cover letter stating that it duplicated the November 30 letter of intent "with the additional items required by HUD."

On January 4, 1985, representatives of Newport and Sears again conferred regarding the draft document sent by Newport. They negotiated and revised its provisions. In particular, they discussed its reference to rent. New-

port's representative believed that both parties understood that this provision implicitly required use of the Goldman Sachs formula. Thus, although the draft allowed Sears to propose design changes that would increase construction costs, the rent adjustment referred to in the draft could be calculated. At the end of this discussion, Sears' representative stated that he would review the document and present it to Sears' officials for approval. Ron Stafford and A.H. (Art) Ruff of Sears reviewed the document and Ruff executed it on January 9, 1985. Newport accepted the terms of the agreement the following day.

On January 24, 1985, Sears' counsel spoke to a HUD official and confirmed Sears' agreement to proceed with the project. Sears' counsel told the official that no other corporate approval for the project was required and that Sears would proceed under the terms of the January 9, 1985 document. Stafford also later testified that after January 9 the Newport project was a "done deal."

The January 9 document appears on Sears letterhead and reads, in pertinent part:

> We have analyzed the proposal offered by you for the construction of a new import/export warehousing facility to be located within the Newport Industrial Park, New Orleans, Louisiana, such construction to be on a build-to-suit basis. Based upon our analysis and subject to the preparation of mutually agreeable legal documentation, we are prepared to enter into the transaction on substantially the following terms and conditions.
>
> . . . .
>
> 2. We have revised your proposal to provide that the facility shall initially be an approximately 650,000 square foot building with related improvements to be constructed by Newport, and is designed to accommodate additional expansion of approximately 300,000 square feet. . . .
>
> . . . .

4. It is our understanding that Newport Limited is working with the City of New Orleans in its request for a HUD Urban Development Action Grant in the amount of $8,000,000 to fund the public infrastucture described in item 3 above. Our commitment to this transaction is contingent upon the said infrastructure being provided.

5. The initial lease term shall be 25 years with the lease containing six five-year renewal options.

. . . .

7. During the initial term of the lease, the annual rent per square foot will be $2.48, to be adjusted to reflect the value engineering currently in progress, Tenant changes and increases due to inflation factors.

. . . .

It is to be understood that the matters contained in this letter will form the basis of a much more detailed document, the terms and conditions of which are subject to the mutual agreement of the parties. It is therefore not intended to be a comprehensive statement of our respective rights, duties and obligations which will be fully set forth in said document.

. . . .

The undersigned has the authority to execute this letter agreement with Newport Limited.

/s/ A.H. Ruff

Regional Real Estate Manager

Sears executed this document, which provides that the rent figure of $2.48 per square foot was to be adjusted. In deposition, four Sears officials—Ruff, Reaves, Hosch, and Tidmarsh—testified that Sears never intended to pay more than $2.48 as a final rent. Sears did not inform Newport of this intention.

After the January 9 agreement, Newport continued developing the project. Actual construction could not begin, however, until Sears provided more specifications. On June 20, 1985, the parties met to discuss these matters. Sears agreed to provide building plans and specifications within two weeks of the June 20 meeting. The bid package was to be completed by September. In fact, Sears never delivered the necessary information.

Eleven days later, on July 1, 1985, Charles Reaves became Sears' Vice President of Distribution. Reaves was chairman of a task force studying Sears' distribution system. By the summer of 1985, Reaves concluded that Sears had excess warehouse and distribution space—without the Newport facility. Sears therefore decided that it neither needed nor wanted to lease more space at Newport. Subsequently, the company issued a moratorium on all major warehouses.

On September 16, 1985, Reaves and other Sears officials met to develop a strategy regarding Newport. After the meeting, on September 18, Ruff circulated a memorandum summarizing the options that had been considered. According to Ruff, these were (1) candidly advise Newport that Sears would not proceed and desired to cancel the project; (2) proceed with the project to avoid legal consequences and protect Sears' credibility; (3) proceed but take "an extremely hard nosed position" in negotiations with the acknowledged possibility that such an approach might cause Newport to abandon the project; and (4) request to stay the project for several months pending reconsideration by Sears of whether to proceed, downsize, or cancel the project. Ruff stated that the consensus of the September 16 meeting was to recommend the fourth option to senior management.

Six months later, Newport requested design information from Sears and suggested a schedule for the construction. On March 14, 1986, Ruff circulated a memorandum discussing this schedule. It began by stating, "The

officers of the company have decided to proceed with the leasing and development of the 650,000 square foot IDC in New Orleans with Newport Enterprises." On a copy of this memorandum, Vice President Dan Reaves added the handwritten notation, "there is no way we could work with these dates and even if we could we would still stay with our original plan, i.e. 'drag our feet'!"

After the September 1985 Sears meeting, Sears had ceased providing information to the Newport project developers. Sears' supervisor of construction planning was informed that the project was discontinued. Other Sears employees referred internally to the project being on hold.

At meetings in October and November 1985, Sears requested that Newport agree to a six month delay so that Sears could complete a study of its distribution practices. Newport examined the impact of this request, particularly upon the HUD Grant. On December 4, 1985, Sears officials including Reaves, Ruff, and Houk met with Newport personnel. Newport informed Sears that the requested delay would endanger the Grant, and so Newport refused. A Sears official suggested that the project be reduced in size. Newport declined, citing the January 1985 agreement to 650,000 square feet and noting that a reduction would also jeopardize the Grant. Finally, Ron Ruth stated that Sears would honor its commitments.

At this time, Newport proposed a bid package for one design of the facility. Sears agreed to review the proposal and provide suggestions or approve it or both. Sears did not do so.

In January 1986, Sears requested that Newport respond in writing to a proposal to downsize the facility. On January 15, 1986, Newport declined this proposal. Newport noted that the HUD Grant had been awarded on the basis of the original proposal, and would be jeopardized by a reduction. Other government agencies had made plans and commitments based on the original size as well.

In February 1986, Ruff wrote a letter for Sears confirming that Sears' officers had decided "to move forward with the leasing of the 650,000 square foot facility." This letter stated that the rent was "not to exceed $2.48 a square foot." When a Newport employee called to discuss rent, Sears stated that $2.48 was "non-negotiable."

Meanwhile, Sears had advised Newport that it would make design changes, but did not respond to Newport's proposed bid package. Changes proposed by Sears might have increased construction costs.

In March 1986, Sears delivered a draft lease to Newport. Like the February letter, the draft lease set the "non-negotiable" annual rent at $2.48 per square foot. The draft lease also allowed Sears to make changes to the building prior to construction, without affecting the rent. Finally, contrary to previous negotiations, the lease provided that Newport would pay for insurance on the facility.

II

Newport sued Sears in June 1986 alleging breach of contract, civil RICO, and deceptive trade practices. In 1990, the district court dismissed the RICO claims on the merits and dismissed the pendent state law claims without prejudice. Newport Ltd. v. Sears, Roebuck & Co., 739 F.Supp. 1078 (E.D.La.1990). Newport appealed, and we affirmed the dismissal of the RICO claim but vacated the dismissal of the pendent claims. Newport Ltd. v. Sears, Roebuck & Co., 941 F.2d 302 (5th Cir.1991). On remand, Sears once more sought summary judgment on the state law claims, which the district court granted. Newport again appeals.

III

A.

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. Hanks v. Transcontinental Gas Pipe Line Corp.,

953 F.2d 996, 997 (5th Cir.1992). Summary judgment is proper only if the record discloses that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Harbor Ins. Co. v. Trammell Crow Co., 854 F.2d 94, 98 (5th Cir.1988) (quoting Fed.R.Civ.P. 56(c)), cert. denied, 489 U.S. 1054, 109 S.Ct. 1315, 103 L.Ed.2d 584 (1989). We indulge every reasonable inference from the facts in favor of the non-movant. Powers v. Nassau Development Corp., 753 F.2d 457, 462 (5th Cir.1985).

B.

Before reaching the merits, we must determine which documents in the record should be considered. Specifically, Sears has moved to strike Newport's references to three documents prepared by Houk, an in-house attorney at Sears. We have carried that motion with the case.

On May 18, 1990, the district court entered an order holding that these documents were subject to the attorney-client privilege. That order, in effect, struck them from the record. In the prior appeal, this court affirmed that order. Newport Ltd. v. Sears, Roebuck & Co., 941 F.2d 302, 308 n. 10 (5th Cir.1991). Our decision, however, noted that the district court's evidentiary ruling may have been influenced by its contemporaneous dismissal of the action, which this court vacated. Our opinion stated that "the district court is free to revisit that issue, should it choose to do so, as it may apply to the state-law claims" that we reinstated. Id.

Newport does not contend that the district court reconsidered its ruling on this issue. Nor did Newport request reconsideration. It explains this omission by referring to the district court's order on remand that "pretrial motions shall not be filed without leave of it." This does not explain, however, why Newport did not seek leave to move for reconsideration. Moreover, Newport's responses to Sears' motion for summary judgment did not

request consideration of these documents—indeed, Newport did not mention the documents. Nonetheless, Newport refers to these documents in its briefs to this court. It contends that they remained part of the record that we may consider, or that we may rule on their admissibility ourselves.

We conclude that we are unable to consider these documents in our determination. Privileged documents are inadmissible and this may not defeat summary judgment. See Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 192 (5th Cir.1990). Newport did not seek reconsideration of the district court's evidentiary decision and the court did not choose to revisit the issue sua sponte. Having once affirmed the district court's ruling, we will not revisit the issue where the district court has not done so.[1]

Sears' motion to strike also refers to documents prepared by Ruff, Sears' regional real estate manager. The district court held that these materials were not privileged and they remain part of the summary judgment record on appeal.

IV

Evidence in the record supports conflicting understandings of the relationship between Newport and Sears. Giving credence to the inferences most favorable to Newport, the non-movant, we conclude that Sears is not entitled to judgment as a matter of law regarding any of Newport's claims.

A.

1.

Newport maintains that a binding agreement came into effect when both parties executed the letter dated January 9, 1985. The developer argues that Sears intended to

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[1] Sears' request for sanctions against Newport is denied. Given our remand on the merits, we once more note that the district court may revisit the issue, if it so chooses.

commit to the project and agreed on all its essential terms. Sears denies that the letter was meant as an enforceable agreement; it claims to have executed the letter only to facilitate the HUD grant. To support its position, Sears points to language referring to terms and conditions to be agreed upon in the future.

Although there is little authority, Louisiana law appears to recognize the enforceability of preliminary agreements.

> The settled jurisprudence of this State is that an agreement between parties, where their minds have met upon all essentials, constitutes a contract between them and binds them at once although they may have agreed that they would thereafter execute a formal instrument containing the terms of their present agreement.

Mermelstein v. Schwab, 64 So.2d 37, 38 (La.Ct.App. 1953) (citations omitted). A so-called preliminary agreement may be binding, even though it refers to a future written agreement finalizing its contents. Chevron U.S.A., Inc. v. Martin Exploration Co., 447 So.2d 469 (La. 1984). In Martin Exploration, the Louisiana Supreme Court noted that use of the word preliminary "does not preclude the agreement from being final until later agreements are reached, or from being the only agreement in the event no other agreements are confected." Id. at 472. Moreover, the court found that the reference to a document "finalizing the points listed above" did not evince an intent to be bound only upon the execution of a later instrument. Id. Nor did an allusion to future "negotiations" render the preliminary agreement non-binding. To the contrary, the Supreme Court of Louisiana held that the document was binding as that interpretation most accurately reflected the intentions of the parties. Id.

Thus, whether a binding obligation existed upon the execution of the letter of intent of January 9, 1985, or

only upon the execution of a later, more comprehensive document, depends upon the intentions of the parties. Courtin v. Sharp, 280 F.2d 345, 349 (5th Cir.1960), cert. denied, 365 U.S. 814, 81 S.Ct. 693, 5 L.Ed.2d 692 (1961) (citing Mermelstein); cf. La.Civ. Code Art. 1947 (West 1987) (certain form of contract execution required if contemplated by the parties). The parties' intent is a question of fact. See Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 190 (5th Cir. 1985), cert. denied, 475 U.S. 1017, 106 S.Ct. 1202, 89 L.Ed.2d 315 (1986); see also Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 788 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (New York law), writ ref'd n.r.e., cert. dismissed, 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988).

Newport argues that a reasonable person, examining the summary judgment evidence, could find that Sears and Newport intended to be bound by the January 9, 1985 letter agreement. We agree. There is ample evidence to support this conclusion.

The Supreme Court in Martin Exploration considered the actions of the parties taken subsequent to the agreement in dispute as a basis for inferring the parties' intentions. Martin Exploration, 447 So.2d at 472. That approach proves useful in the present case. Sears' actions subsequent to the letter of intent indicate that it considered itself bound. In particular, when Sears officials became uncertain as to the need for the warehouse which Newport would provide, they requested to stay the project. The two parties characterize Sears' actions differently. Newport claims that Sears attempted to frustrate Newport's efforts to implement the agreement and that Sears therefore acted in bad faith. Sears responds that it intended to complete the transaction but disagreed with Newport on some of the terms. The claims of the two parties support the same conclusion, that is, that Sears considered the agreement binding. If Sears were not

bound, it would not have required Newport's permission to suspend the project.

The letter of January 9, 1985 offers some basis for concluding that Sears bound itself to the project. Thus, for example, Sears designated the document a "letter agreement" and expressed an intent "to enter into the transaction on substantially the . . . terms and conditions" in the letter. This language indicates that the parties had settled on the essential terms of the transaction. Other aspects of the letter, however, are more ambiguous. The qualification that the letter was not a "comprehensive statement of [the parties'] rights, duties and obligations" is representative in this regard. That claim suggests, on the one hand, that the parties had established in the letter certain rights, obligations and duties but, on the other hand, that other such terms would follow. It leaves unclear whether any of the essential elements of the deal had yet to be resolved.

Other evidence is probative of Sears' intent in signing the letter. Thus, for example, after Newport signed the letter, Sears officials stated that the deal was consummated. We need not conclude with certainty, however, that Sears intended that the letter serve as a contract. We hold only that based on the record, a reasonable jury could reach that conclusion.

2.

Sears maintains that, regardless of intent, the January 9, 1985 letter is legally insufficient as a lease instrument. Under Louisiana law, the confection of a lease obligation must meet three requirements. It must indicate: the object of agreement, its price, and the parties' consent. Trinity Carton, 767 F.2d at 190 (citations omitted). See also La.Civ.Code art 2670 (West 1993).

Sears first notes that the letter of January 9, 1985 is unclear about the amount of rent to be paid. It provides for annual rent of $2.48 per square foot "to be adjusted."

Sears could make design changes, giving it control over one adjustment factor. Sears relies on Louisiana state law suggesting that, for a lease to be valid, the factors that determine rent must not be within the control of the parties. See, e.g., Sealy (Pines Rd.) v. Physicians & Surgeons Hosp., Inc., 480 So.2d 832, 837 (La.App. 2 Cir. 1985), writ denied, 483 So.2d 1024 (La.1986) (finding rent determinable where it was implicitly renewed at a rate agreed upon in the past because it was "beyond control of the parties"). The law merely requires, however, that the parties have completed negotiating the amount of the rent, although the parties' decisions or actions may influence the rent owed. See, e.g., Mouton v. P.A.B., Inc., 450 So.2d 410, 412 (La.App. 3 Cir.1984), writ denied, 458 So.2d 118 (La.1984) (rent made contingent on profit's earned by lessee, over which lessee had control, was nevertheless determinable). Newport offers evidence that the Goldman Sachs formula would govern the adjustments made to the rent. Indeed, at one point, Sears relied on the formula to correct an error that Newport had made in a provisional calculation of the rent. Testimony suggests that the formula would reflect any changes Sears might require. Thus, if a jury were to accept that the contract incorporates the Goldman Sachs formula, the rent is determinable.

Sears also claims that the premises were not adequately defined to support a lease. In response, Newport points to the letter's description of a 650,000 square foot facility and improvements to be made at the site to establish that the lease was sufficiently determinate. The Supreme Court of Louisiana has held that, where the plans and specifications of premises to be leased have yet to be negotiated, no enforceable lease exists. Sig Haas & Son v. Bernhardt, 144 La. 927, 81 So. 402, 403 (1919) (finding an oral lease unenforceable where its terms were insufficiently definite). In reaching that conclusion, however, the court indicated that had the unresolved aspects of the lease lay within the control of one of the parties,

the lease might have been enforceable. Id. ("Plaintiffs do not allege that they alone were to decide upon the plans and specifications . . ."). See also Arata v. Louisiana Stadium and Exposition District, 254 La. 579, 225 So.2d 362, 366-67 (1969), cert. denied, 396 U.S. 279, 90 S.Ct. 569, 24 L.Ed.2d 467 (1970) (finding a sufficiently defined "thing" where the site of a stadium was subject to possible change upon mutual agreement). Newport claims that Sears reserved the right to change the specifications and plans for the storage facility and that the Goldman Sachs formula for determining the rent would reflect the cost of such changes. If the jury were to accept this contention, it could find that a sufficiently determinate lease existed to bind the parties. We are not prepared to deny the jury that opportunity.

3.

Sears invokes the doctrine of error, arguing that any consent it gave in January 1985 was ineffecive because Newport misled it. Under the Louisiana Civil Code, a party is not bound by a contract which it entered as a result of error, fraud or duress. La.Civ.Code art. 1948 (West 1993). More precisely, if a party would not have entered a contract had it not held a mistaken belief, and the other party was or should have been aware of this mistake, the party is not bound by that contract. La. Civ.Code art. 1949 (West 1993). Sears' reliance on this doctrine is misplaced.

Sears maintains that its reason for signing the letter was to allow Newport to secure a grant. Newport claims that Sears committed itself to the transaction through the letter. These two views are not inconsistent. In order for Newport to secure a HUD grant, it needed a statement from Sears indicating Sears' commitment to the project. That Sears bound itself when it did, if it did, in order to enable Newport to pursue the grant does not preclude the possibility that the letter constituted a contract. Sears

wanted Newport to build a warehouse. Newport desired Sears as its primary tenant. Thus, Sears and Newport had complementary interests which could serve as the basis for a contract. That the desire to secure a grant prompted the formation of the contract would not make it any less binding. A reasonable jury could find that a contract existed.

B.

Newport claims that Sears committed fraud on several occasions. It pursues these claims under Louisiana Civil Code articles 1953 and 2315.

1.

To recover under article 1953, Newport must demonstrate the existence of a contract. See Pedalino v. Pitre, 431 So.2d 20, 21 (La.App. 1 Cir.1983) (Article 1953 pertains only to parties to a contract); State Farm Fire & Casualty Co. v. Williams, 453 So.2d 309, 311 (La. App. 1 Cir.1984) (same). Assuming Newport meets this burden, it must then show, first, that Sears misrepresented or suppressed the truth with the intention of either gaining an unjust advantage or causing Newport to suffer a loss and, second, that this misrepresentation or suppression of the truth caused actual or probable damages to Newport. Dutton & Vaughan, Inc. v. Spurney, 600 So.2d 693, 698 (La.App. 4 Cir.), writ denied, 601 So.2d 663 (La.1992). Newport predicates its claim under article 1953 on the letter Sears executed in January 1985. Assuming, without deciding, that the letter constituted a contract, we find that Newport has raised a genuine issue of material fact as to whether Sears intentionally misled Newport in order to gain a strategic advantage.

In the letter of January 1985, Sears stated that it would pay rent at an annual rate of $2.48 per square foot to be adjusted to reflect, among other considerations, "the value [of] engineering" in progress at the time. In an internal review in 1984, Sears noted that the then

prospective engineering could increase the monthly rent by as much as 10%, up to $2.73. Several Sears officers testified, however, that Sears never intended to pay more than $2.48 per square foot per year for the leased space. Newport claims that this contradiction supports the inference that the January 1985 letter was deliberately misleading. Sears hoped, according to Newport, to effect engineering changes only later to refuse to accept any increase in the cost of rent. Newport's investment in reliance on the letter would by then have placed Sears in an advantageous bargaining position.

Newport's evidence supports its contention that Sears took deliberately misleading actions in order to secure a bargaining advantage. If the lease incorporates the Goldman Sachs formula, as it must to be sufficiently definite, Sears' proposed changes could have increased the rent to more than $2.48. Sears' apparent intent from the outset to refuse to pay the augmented amount is curious. Moreover, Sears' officers decided to adopt a deliberately "hard nosed position" in forcing Newport to choose between accepting the $2.48 in rent or abandoning the project. Thus, Sears gained a tactical advantage from Newport's reliance on Sears' commitment, if Sears in fact made one, to abide by the Goldman Sachs formula. Sears' claim that it never believed that it had committed itself is plausible. Nevertheless, the inference is fair that Sears anticipated and even intended the benefit it received by misleading Newport. We therefore find that Newport has raised a genuine issue of material fact as to its first allegation of fraud.

2.

Newport also proceeds on a charge of delictual fraud pursuant to Civil Code article 2315. The elements of this cause of action are: "(1) a misrepresentation of a material fact, (2) made with the intent to deceive, and (3) causing justifiable reliance with resultant injury." Abell v. Potomac Ins. Co., 858 F.2d 1104, 1131 n. 33 (5th Cir.1988) vacated on other grounds, 492 U.S. 914, 109

S.Ct. 3236, 106 L.Ed.2d 584 (1989) (citing La.Civ. Code arts. 1847, 2315; Silver v. Nelson, 610 F.Supp. 505, 521 (E.D.La.1985)). To recover under article 2315, Newport need not prove the existence of a contract. Id. (citing Restatement (Second) of Torts as referred to in Dousson v. South Cent. Bell, 429 So.2d 466, 468 (La. App. 4th Cir.), writ not considered, 437 So.2d 1135 (La. 1983)). Newport bases this cause of action on several statements by officers of Sears that it wished to continue development of the warehouse. These statements persisted after a meeting in which Sears officers considered several possible courses of action. A memorandum that one of the officers circulated after the meeting summarized these options. They included: (1) candidly informing Newport that Sears would not proceed with the project; (2) proceeding with the project to avoid legal consequences and to protect Sears' credibility; (3) proceeding but taking "an extremely hard nosed position" with the acknowledged possibility that Newport might abandon the project; and (4) requesting to stay the project pending reconsideration of whether to proceed with, downsize, or cancel the project. One of the officers, Ruff, later circulated a memorandum expressing a general agreement to proceed under option four. Six months later, however, when Newport submitted a request for design specifications and suggested a schedule to begin construction, Vice President Dan Reaves wrote on his copy of a memorandum discussing the request that "there is no way we could work with [Newport's proposed schedule] and even if we could we would still stay with our original plan, i.e. 'drag our feet'!" Sears never submitted to Newport the requested specifications.

This evidence, and evidence indicating that Sears did not wish to proceed with the warehouse, together suggest that Sears deliberately misled Newport as to its intentions. Sears' allegedly refused to acknowledge its desire to abort the project in the hope that Newport would despair of its completion. As Sears' memorandum indicates, if Sears

forthrightly abandoned the project Newport would likely take legal action, whereas a successful effort at stalling might leave Newport with the impression that the endeavor simply failed. This, at any rate, is Newport's argument. Sears' claim that it negotiated in good faith is plausible. A reasonable jury could find, however, that Sears misrepresented its intentions in order to avoid liability. As Newport has raised this genuine issue of material fact, we reverse the district court's grant of summary judgment to Sears.

C.

Newport also seeks recovery under Louisiana Civil Code article 1967, which provides in pertinent part:

> A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

To recover under article 1967, Newport must establish that Sears made a promise on which Newport relied justifiably and to its detriment. See Breaux v. Schlumberger Offshore Services, 817 F.2d 1226, 1229 (5th Cir.1987). South Central Bell Telephone Co. v. Rouse Co., 590 So.2d 801, 804 (La.App. 4 Cir.1991). Newport need not prove the existence of a contract to establish its claim of detrimental reliance, even in a context where a contract would normally govern. See Morris v. People's Bank & Trust Co., 580 So.2d 1029, 1036 (La.App. 3 Cir.), writ denied, 588 So.2d 101, 102 (La.1991) (allowing a plaintiff to proceed to trial under detrimental reliance) and Morris v. People's Bank & Trust Co., 580 So.2d 1037, 1043 (La.App. 3 Cir.1991) (holding that the statute of frauds barred the plaintiff from pursuing the same claim in contract).

Newport predicates this claim on various of Sears' statements. The most notable of these include two letters of intent, the second arguably constituting a contract, that Sears sent Newport in November 1984 and January 1985. Sears expressed in the first letter its "intention to enter into [the] transaction" and stated in its second letter that it was "prepared to enter into the transaction." Both letters contained the essential terms under which Sears would lease a warehouse from Newport. Moreover, officers of Sears later acknowledged a commitment, both by recognizing in internal memoranda, as one officer expressed the matter, that "Sears ha[d] a moral obligation and possibly a legal obligation either to proceed or to reimburse the developer's costs," and, later, by requesting that Newport allow Sears to stay the project for a period of several months. If Newport had no reasonable basis for believing that Sears had committed itself to the project, Sears would not have needed Newport's permission for this delay.

In Breaux, this court upheld a plaintiff's recovery under detrimental reliance on a claim similar in nature to Newport's. Breaux, 817 F.2d at 1230. The parties in Breaux had agreed on the terms under which the defendant would lease the plaintiff's office space. In contrast to the present case, the agent for the defendant who arranged the transaction had stated clearly that commitment would have to await the approval of his superior. Nevertheless, on the basis of a letter from the agent expressing the defendant's "intention to enter a rental agreement," the plaintiff ceased making any other efforts to let the space. Subsequently, when the market changed, the defendant decided not to abide by the original terms of the transaction. Id. at 1228-29. This court affirmed the district court's order allowing the plaintiff to recover for rent lost in reliance on the defendant's stated commitment. Id. at 1233.

Sears sent Newport its letter in January 1985 for the specific purpose of confirming its commitment to the

transaction. Sears subsequently acknowledged the possible moral and legal obligations it had incurred as a result of the actions that Newport had taken. A jury could find that Newport had expended considerable time and effort, and had foregone other lucrative possibilities, in reasonable reliance on the committment Sears expressed to lease the warehouse space.

D. Damages

Finally, to recover under any cause of action, Newport must establish the damages it suffered as a result of Sears' actions. To defeat summary judgment, Newport must raise a genuine issue of material fact in regard to the damages it claims. Toward this end, Newport offers the testimony of its expert witness.

Newport's offer of summary judgment evidence in support of its claims for damages is admittedly thin. Where, as here, the district court has not excluded expert evidence as inadmissible, it ordinarly is the province of the jury to gauge the expert witnesses credibility and the reliability of his data. See Dixon v. International Harvester Co., 754 F.2d 573, 580 (5th Cir.1985) (citing Grenada Steel Industries v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir.1983)). In particular, Newport offered an expert's statement as to the amount of damages it suffered in out-of-pocket costs, lost public monies, and lost profits. Moreover, in Newport's submissions to the court, Newport appended the calculations upon which the estimate of lost profits was based. Without now deciding on the appropriateness of compensating Newport for these categories of damages, we hold that Newport's evidence, which Sears failed to rebut, raised a genuine issue of material fact.

Conclusion

Newport has raised genuine issues of material fact on its claims for breach of contract, fraud and detrimental reliance. As a result, we REVERSE the decision of the district court and REMAND for further proceedings.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Charles R. Fulbruge III
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

January 28, 1994

TO ALL PARTIES LISTED BELOW:
No. 92-3832—Newport Limited v. Sears, Roebuck & Co.

Dear Counsel:

The Court has directed that a correction be made to the last page in the above referenced appeal. A corrected copy is enclosed.

Very truly yours,

CHARLES R. FULBRUGE III
Clerk

/s/ Rhonda Flowers
Deputy Clerk

Enclosures
Hon. George Arceneaux, Jr.
Mr. Phillip A. Wittmann
Mr. Stephen H. Dupperman
Mr. George C. Freeman, III
Mr. Alex J. Peragine
Mr. W. Anthony Toups, III
Mr. Louis A. Lehr, Jr.
Mr. Paul A. Nalty
Mr. Arthur L. Klein

[Original Corrected]

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[* Material set in bold face replaces bracketed material.]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2319
Section "K" (5)

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM

versus

SEARS, ROEBUCK AND CO.

September 9, 1992, Decided
September 9, 1992, Filed; September 10, 1992, Entered

GEORGE ARCENEAUX, JR., Judge.

ORDER AND REASONS

Defendant, Sears, Roebuck and Co. ("Sears"), filed a motion for summary judgment on May 7, 1992. The court took this motion under submission on May 27, 1992. Raving considered the memoranda in support, the opposition memoranda, the record, and the applicable law, the court finds this motion to have merit.

BACKGROUND

The facts forming the basis for this litigation have been detailed in opinions issued by this court and the U.S. Court of Appeals for the Fifth Circuit.[1] The court, there-

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[1] *Newport Ltd. v. Sears, Roebuck & Co.*, 739 F. Supp. 1078 (E.D. La. 1990), aff'd in part and rev'd in part, 941 F.2d 302 (5th Cir. 1991), cert. denied, —— U.S. ——, 112 S. Ct. 1175 (1992).

fore, only recites those facts necessary for a decision on the issues before it today.

Newport Limited ("Newport") acquired a large tract of land during 1981 in New Orleans located at the intersection of the Mississippi River-Gulf Outlet and the Gulf Intercoastal Waterway. Newport intended to develop this land into the Newport Industrial Park. In 1983, Sears and Newport began discussing the possibility of developing an import/export distribution facility at the Newport site.

These negotiations eventually led to a "letter of intent" from Sears to Newport dated November 30, 1984 (Exhibit 23 to Opposition to Motion for Summary Judgment). This letter of intent expressed Sears' willingness to enter into a build-to-suit transaction of a new warehousing facility at the Newport Industrial Park. The City of New Orleans (the "City") apparently needed this letter for submission to the United States Department of Housing and Urban Development ("HUD") as part of an application for an Urban Development Action Grant ("UDAG") on behalf of Newport. The correspondence further stated: "This transaction is contingent upon Sears negotiating and legally documenting terms and conditions acceptable to Sears." The letter thereafter set forth a summary of some of the proposed terms of the transaction.

Newport subsequently informed Sears that it needed a "firmer" commitment from Sears for the City's UDAG application to HUD. Sears, therefore, provided a letter dated January 9, 1985, that essentially "duplicated" the letter of November 30, 1984. Newport's letter transmitting to Sears the January 9 letter apparently drafted by Newport referred to it as "a duplication of your November 30, 1984 letter with additional items required by HUD" (Exhibit 9 to Memorandum in Support of Motion for Summary Judgment). In the January 9th letter, the parties state, in pertinent part:

> We have analyzed the proposal offered by you for the construction of a new import/export warehousing facility to be located within the Newport Industrial Park, New Orleans, Louisiana, such construction to be on a built-to-suit lease basis. Based upon our analysis and subject to the preparation of mutually agreeable legal documentation, we are prepared to enter into the transaction on substantially the following terms and conditions.
>
> . . . .
>
> It is understood that the matters contained in this letter will form the basis of a much more detailed document, the terms and conditions of which are subject to the mutual agreement of the parties. It is therefore not intended to be a comprehensive statement of our respective rights, duties and obligations which will be set forth fully in said document.

R. at 548 (Exhibit 10). This letter, therefore, set forth the general terms that would govern a future lease agreement between Newport and Sears.

The parties thereafter continued to negotiate for the next eighteen months or so but failed to reach a more specific agreement. The court appreciatingly borrows from the following summary of the parties' explanation for such failure provided by the Fifth Circuit:

> Newport insists this failure was the result of a calculated strategy by Sears [sic] representatives to withdraw from the transaction because of a perceived change in its warehousing needs. This strategy purportedly was guided by a four-option memorandum drafted by Sears' in-house counsel, D. Charles Kouk, the gist of which was to stonewall so staunchly during negotiations and to provide such minimal technical assistance, that Newport, rather than Sears would lose interest, and eventually withdraw from the project, taking the blame for its collapse.

> Sears indicates that after a change in corporate leadership some of its priorities changed, but that it was still willing to continue the project in some form, albeit with same delay. According to Sears, the project collapsed because of Newport's resistance to changes, general uncooperativeness, and unrealistic expectations. The parties also disagree on whether a $2.48 per square foot per annum lease rate was agreed upon as a fixed rate or as a platform for adjustment based on unspecified formulae.

Newport Ltd., 941 F.2d at 304. This excerpt succinctly summarizes the parties' respective positions relative to the instant motion.

The Fifth Circuit previously affirmed this court's dismissal of Plaintiff's claims of civil Racketeer Influenced and Corrupt Organizations ("RICO") violations. Id. The appellate court further affirmed this court's finding that it could not exercise diversity jurisdiction over this matter. *Id.* at 302. The Fifth Circuit, however, vacated the order in which this court declined to exercise pendent jurisdiction over the Plaintiff's remaining state law claims. *Id.* at 308. The instant motion for summary judgment, therefore, presents issues previously raised by Sears for hearing over which the court declined to exercise jurisdiction.

The court, having summarized the pertinent facts as briefly as possible, now turns to a discussion of these facts in the context of the applicable law.

DISCUSSION

I. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entiled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When a moving party satisfies the requisites of Rule 56(c), a motion for summary judgment should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The inferences drawn from the underlying facts, however, must be viewed in a light most favorable to the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Finaly, the court notes that the substantive law determines materiality of facts and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court now turns to the merits of the arguments under Louisiana law with these standards for summary judgment in mind.[2]

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[2] Newport devotes several pages of discussion on the standards governing summary judgment. In particular, the Plaintiff avers that this motion should not be granted because the Defendant's "state-of-mind" is at issue and because the court previously denied a motion for summary judgment on December 18, 1986.

The court first notes that the same summary judgment standards govern each of the causes of action asserted by the Plaintiff in this action. Simply because Plaintiff avers that "state-of-mind" is at issue does not preclude the court from examining the pleadings in a light most favorable to the nonmoving party to determine whether summary judgment may be appropriate. While "intent" certainly involves factual determinations in most instances, an absence of material facts in dispute warrants the granting of summary judgment even where a party questions an adversary's "state-of-mind". Plaintiff presents no persuasive authority to the contrary.

The previous denial of a motion for summary judgment does not preclude a trial court from subsequent reconsideration of such a motion. See Fed. R. Civ. P. 54(b) (noting that any order or other form of decision is subject to revision any time prior to entry of final judgment). Here, Defendant Sears presented a summary judgment motion at an early stage of this litigation. The court denied this motion because it found that, at the time, Newport had raised sufficient issues of fact relative to the intent and performance of the parties. R. at 47. The parties, however, have engaged in voluminous discovery since December 1986 and, in light of such

II. The Existence of an Obligation

Defendant Sears first moves the court to enter summary judgment on its behalf with respect to Plaintiff's first and third causes of action. In support thereof, Sears argues that the absence of a binding agreement precludes Newport from asserting these contractually-based causes of action. Newport presents a number of arguments disputing Sears' contentions that it incurred no legally-binding obligation and that no material facts in dispute exist to prevent summary judgment.

Sears presents the court with three arguments in support of its position that the letter dated January 9, 1985, failed to create a legally-binding agreement. First, the Defendant contends that the parties never fulfilled the condition of reaching a more extensive later writing. Next, Sears argues that, under Louisiana law, this "agreement to agree" failed to meet the requirements necessary for a lease. Finally, according to the Defendant, Newport's alleged misrepresentation of this letter as anything more than a letter of intent for use with HUD vitiated Sears' consent.

Newport counters with five arguments in opposition to Sears' contentions. Initially, the Plaintiff seeks to convince the court that the letter of January 9, 1985, in and of itself, is a valid, enforceable lease agreement. Next, according to Newport, the contemplation of a later writing does not render this purported agreement unenforceable. Third, the Plaintiff avers that, even if the court finds a final base lease necessary as a precondition to any obligation imposed on Sears, such condition should be regarded as fulfilled because of the Defendants' alleged bad faith. Next, Newport characterizes Sears' contentions of vitiated consent because of error as frivolous. Finally, the Plaintiff argues that material issues of fact exist rela-

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discovery, the court finds itself unrestricted in considering the instant motion.

tive to Sears' claims of no contract having been created and to its claims of the Defendants' bad faith in fulfilling the condition of a later writing.

A. Of Lease . . .

The court first addresses whether the letter of January 9, 1985, created an enforceable lease agreement. In so doing, it finds the letter's contents compel this issue's answer to be in the negative.

Article 2670 of the Louisiana Civil Code states the following with respect to the essential elements of a lease: "To the contract of lease, as to that of sale, three things are absolutely necessary, to wit: the thing, the price, and the consent." La. Civ. Code Ann. art. 2670 (West 1952). In this instance, Sears disputes both the elements pertaining to the price and its consent. Under the facts before it, the court cannot disagree.

Newport and Sears defined the price to govern their lease in the January 9, 1985 letter as follows: "During the initial term of the lease, the annual rent per square foot will be $2.48, to be adjusted to reflect value engineering currently in process, Tenant changes and increases due to inflation factors." R. at 548 (Exhibit 10). While the Civil Code speaks of rent for lease of a thing as a "certain stipulated price", the Louisiana jurisprudence indicates that rent may be certain if merely readily ascertainable. In *Mouton v. P.A.B., Inc.*, 450 So. 2d 410 (La. Ct. App.), cert. denied, 458 So.2d 118 (La. 1984), the state court stated:

> Rent must be stipulated and agreed upon between the contracting parties before there is a valid lease contract. . . . Nevertheless, it is not essential that the rent be fixed at a specified sum of money per week, month, or year. . . . Rent is always sufficiently certain if it can be readily ascertained. . . . As long as the rent can be determined from factors or cir-

> cumstances not within the control of the parties, the rent is certain.

Id. at 412-13 (citations omitted). As applied to the facts in this action, the court is unwilling to conclude that the parties have met the requisite of a certain or readily ascertainable price.

The court, notwithstanding Newport's arguments to the contrary, finds the provisions of the January 9, 1985 letter failed to adequately specify a price. The purported lease agreement specified a formula for rent but such formula depended on at laset one factor within the control of the parties. In particular, assuming arguendo that the terms "value engineering" and "inflation factors" represented sufficiently certain "factors or circumstances,", the parties stipulated that the rent would be contingent on Sears' changes. Thus, because the parties left the lease price subject to such changes, such changes were not specified, the method of costing same not announced, and the effect same would have in the rent left indeterminate, the letter agreement failed to comprise a valid lease under Louisiana law.

The parties, however, also failed to meet the requisite of consent—an element of the lease that Newport insufficiently addresses. In this case, the undisputed facts demonstrate that Sears supplied the January 9, 1985 letter for use with the City's UDAG application to HUD. Newport admits as much in its statement of facts provided with its memorandum in opposition to this motion. R. at 550. Thus, even if the court determined that the requisite of price had been met, the facts show that neither party intended the letter of January 9, 1985, to be a lease between the parties. As expressly stated, the obligations between the parties would be subject to a more comprehensive written agreement.[3]

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[3] Newport, in presenting its arguments relative to a leave having been formed, characterizes Sears' contention of error as frivolous. But, even in discussing such assertion, the Plaintiff speaks in terms

Newport's arguments relative to a valid lease being formed, therefore, fail for lack of a specified rent and for lack of consent. In the court's view, the letter left unsatisfied two of the three requirements for a valid, enforceable lease of a thing under Louisiana law.[4]

B. Of Contract . . .

The court, having disposed of Newport's contentions that a valid lease had been formed, next turns to whether a valid contract existed between the parties subjecting Sears to an enforceable obligation. While the facts before the court establish that an "agreement to agree" may have been executed by the parties, the court is not persuaded that Sears consented to any obligation as characterized by Newport, that Sears demonstrated bad faith, or that Newport has raised any material factual dispute pertinent to these issues.

The Louisiana Civil Code provides four requisites for the formation of an enforceable obligation or contract: (1) the parties must have the capacity to consent; (2) the parties must freely give mutual consent to the contract; (3) the parties must have cause or reason to ob-

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of a contract rather than a lease. In so doing, Newport essentially merges the requisites of a lease with the requisites of a contract. The requisites of an obligation formed through contract do not differ substantially from an obligation to let a thing formed through lease. Thus, because no material factual dispute exists relative to the purpose of the January 9, 1985 letter as being necessary for HUD approval of the UDAG application, the court finds the vice of error as discussed by the court in the section below on contract to be relevant and binding on whether consent to a valid, enforceable lease has been established.

[4] Newport, as noted above, avers that, even if the court finds a final lease to be lacking, Sears cannot escape liability because of its "bad faith" failure to proceed with the project. Such argument, however, necessarily involves whether the contractual obligations incurred in the January 9, 1985 letter, if any, have been fulfilled by Sears. For the sake of brevity, the court addresses Newport' allegation of bad faith in the discussion below on contract.

ligate themselves; and (4) the contract must involve a lawful purpose. La. Civ. Code Ann. arts. 1918-1926, 1927-1947, 1966-1970, 1971-1977 (West 1987 & Supp. 1992); see *Ingraffia v. NME Hosps., Inc.*, 943 F.2d 561, 565 (5th Cir. 1991). In this instance, Sears argues that, even should the court determine that the suspensive condition in the January 9, 1985 letter has not been fulfilled because of its purported bad faith, its vice of error claim vitiates the requisite of any mutual consent freely given. In particular, the Defendant argues that Newport's alleged misrepresentation as to the purpose of the January 9, 1985 letter serves to avoid formation of any agreement between the parties.

The court first finds the vice of error to be supportive of Sears' position under the circumstances. The requisite of mutual consent is met "through offer and acceptance" and may be accomplished "orally, in writing, or by action or inaction . . . ." La. Civ. Code Ann. art. 1927 (west 1987); see *Ingraffia*, 943 F.2d at 565, but Louisiana law provides that error may vitiate consent and explains error as follows: "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party." La. Civ. Code Ann. arts. 1948-1949 (West 1987). Sears essentially argues that error should vitiate its consent and void any obligations which may have otherwise been created by the January 9, 1985 letter because it only provided this letter to meet HUD's requirements with respect to the UDAG application. Notwithstanding its arguments to the contrary, Newport fails to raise a genuine factual dispute surrounding the purpose of this letter.

This court, under the evidence before, finds that, if Newport intended this agreement to bind the Defendant to a lease or other obligation based in contract, then the vice of error must apply to vitiate the requisite consent. The undisputed facts (as admitted by Newport) establish that the "cause", or the purpose for which Sears'

"obligated" itself, in this letter involved the UDAG obligation. Both the explicit terms of the letter and the circumstances surrounding it establish this fact. Under Louisiana law, the vice of error vitiates consent of a party where the alleged "cause" materially differs from the "cause" for which it actually entered into an obligation, if any. The undisputed facts, therefore, establish that Sears is entitled to immunity for any damages arising out of any purported contract entered into or obligation incurred to lease a facility at the Newport site by providing the January 9, 1985 letter.

The court further notes that, even should this letter be deemed to represent some form of binding contract or agreement, Newport fails to raise a material factual dispute surrounding Sears obligations under such letter. As cited to the court by Newport, one Louisiana state court explained the effect of a preliminary agreement such as the one arguably involved here as follows:

> Where parties make a preliminary agreement which deals with the subject matter in a general way and provides that essential details shall be elaborated in and defined by a later instrument, they are bound to what is expressly said in the preliminary contract and also to what is to be included in the formal document by reasonable implication. However, neither party is bound to give assent in the formal instrument to anything to which he has not already consented, either expressly or by implication, in the preliminary agreement.

Mermelstein v. Schwab, 64 So. 2d 37, 39 (La. Ct. App. 1953). At most, the parties to this action entered into a preliminary agreement subject to a condition that a more formalized document containing more specific terms would be prepared. The necessary inquiry, therefore, invloves whether Sears fulfilled this purported condition under Louisiana law.

The Louisiana Civil Code expressly defines conditions and the obligations incurred by such conditions, if any. In particular, Louisiana law explains a conditional obligation as follows:

> A conditional obligation is one dependent on an uncertain event.
>
> If the obligation may not be enforced until the uncertain even occurs, the condition is suspensive.
>
> If the obligation may be immediately enforced but will come to an end when the uncertain even occurs, the condition is resolutory.

La. Civ. Code Ann. art. 1767 (West 1987). See generally 5 Saul Litvinoff, The Law of Obligations §§ 5.1-5.30 (1992) (discussing conditional obligations). The Civil Code further provides: "A suspensive condition that depends solely on the whim of the obligor makes the obligation null." Id. art. 1770. Finally, the code states that, "A condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to its fulfillment." Id. art. 1772. Thus, assuming arguendo that the January 9, 1985 letter created a conditional obligation subject to a "suspensive condition" under Louisiana law, Newport still must establish that Sears should be faulted for failing to satisfy such condition and that Sears had an interest contrary to fulfillment.

The court, in addressing both requisites, finds that neither has been met even examining the facts in a light most favorable to Newport's position, as, indeed, the Court must do. A party is not obligated to sign or consummate a final agreement "where the final written contract contemplated differs substantially from the initial agreement . . . ." *J.P. VanWay, Eng'r-Contractor, Inc. v. Communications Broadcasitng, Inc.*, 228 So. 2d 175, 177 (La. Ct. App. 1969), cert. denied, 255 La. 160, 229 So. 2d 736 (1970). On March 13, 1986, Sears

submitted a proposed lease to Newport.[5] The undisputed facts show Newport's failure to further negotiate the terms of this lease and, further, its failure to submit a lease drafted by it in May 1986. Under the circumstances, the court finds that, rather than establishing "fault" on the part of Sears, the facts at most demonstrate the mutual failure to consummate any obligation on the part of both Newport and Sears.

Sears' does not dispute that it delayed proceeding with the project subsequent to the January 9, 1985 letter because of corporate leadership changes and a re-evaluation of its facility needs. Newport attempts to characterize such "delay" as a bad faith attempt designed to force it into default or abandon negotiations with Sears; the Court is not persuaded even upon an examination of the facts in a light most favorable to Newport.[6] At most,

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[5] Newport makes much ado about Sears purported stauch opposition to any increase above $2.48 per square foot for rent even if it made changes to the construction plans. At best, the dispute over this issue may well have represented a negotiating posture by Sears. Newport never even attempted to test Sears' resolve on this issue by presenting a counter proposal or revisions to the proposed lease submitted in March 1986.

[6] The court's instant discussion also disposes of Plaintiff's first cause of action relative to bad faith, in particular, article 1997 provides: "An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." La. Civ. Code Ann. art. 1997 (West 1987). Newport claims that the court cannot dispose of this claim on summary judgment because it is entitled to have a jury decide this issue. See *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 94 (W.D. La. 1984). Such statement, however, pre-supposes genuine material facts in dispute. As noted herein, Newport simply fails to raise any such factual dispute. At most, the record establishes that Sears delayed proceeding with the Newport project for a period to allow for a re-evaluation of its facility needs by new corporate leadership. Thus, the Plaintiff's attempt in its first cause of action to impose liability on Sears for alleged damages under article 1997 must fail as a matter of law. There are absolutely no facts presented to the Court which would warrant a finding of "bad faith."

the evidence cited to the court by Newport establishes that, at one point, Sears decided to "drag our feet" on the Newport project. R. at 550 (Exhibit 75); see R. at 550 (Exhibits 60-71). No testimony or documentary evidence, however, raises a genuine issue of fact surrounding Sears' intent to proceed with the Newport Industrial Park project in some form.

The court also fails to find any allegation supported by the evidence before it that Sears had an interest in nonfulfillment of any obligation which may have been created by the January 9, 1985 letter. Notwithstanding the volumes of deposition excerpts and documents supplied by the parties in this matter, no evidence indicates that Sears considered the completion of the Newport project to be contrary to its interests and, thus, undesirable. In fact, the submission of Sears' proposed lease in March 1986 establishes quite the contrary. As a result, even assuming that an obligation subject to a suspensive condition had been created and that Sears' fault prevented fulfillment of this condition, no evidence has been presented to establish that Newport has met the requirements of Louisiana law to deem the condition fulfilled and an obligation created.[7]

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[7] The court also must briefly address Louisiana jurisprudence on the "term" imposed by a conditional obligation. In particular, article 1778 states:

> A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future or certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time.

La. Civ. Code Ann. art. 1778 (West 1987). See generally Litvinoff, supra, §§ 6.1-6.14, 6.21-6.23 (discussing obligations with a term). Here, the January 9, 1985 letter specified no specific term. While Newport addresses the timetables agreed upon by the parties at various points of their negotiations, the record does not establish that the period of time from the letter of intent until Sears sup-

Newport further fails to establish that its allegations meet the requisite under Louisiana law of placing an obligee in default prior to seeking damages for non-fulfillment of a suspensive condition. In *Electrodata Manufacturing Corp. v. Domed Stadium Hotel, Inc.*, 362 So. 2d 1122 (La. Ct. App.), cert. denied, 365 So. 2d 825 (La. 1978), the Court of Appeal of Louisiana, Fourth Circuit, explained such requisite as follows:

> When a suspensive condition of an obligation is an event to be accomplished by the obligee, delay in fulfilling the condition does not entitle the obligor to damages . . . undess the obligee has first been put in default with respect to the fulfillment of the condition. The putting in default may be accomplished by any of the means specified in [article 1991 of the Louisiana Civil Code (formerly article 1911)] . . . . Putting in default may occur by the mere failure to perform, but only where the contract terms so provide; otherwise . . . the party must demand performance by suit, written demand, notarial protest, or oral demand in the presence of two witnesses.

Id. at 1124-25 (citation and footnote omitted). The Fourth Circuit further indicated that in order for the

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plied the proposed lease in March 1986 was inherently unreasonable, there is no evidence indicating it was otherwise unreasonable and therefore no jury issue on this element is presented. Particularly is this so, considering the need for providing certain vital municipal services to the Newport project, the requirement that involved federal agencies be satisfied, and similar time consuming events.

Indeed, the letter of January 9, 1985 (as did the earlier letter of November 30, 1984) required that "the site be fully served by municipal services, including sewer, water and storm water drainage systems not now available on the South Side of the Mississippi River-Gulf Outlet;" the January 9, 1985 letter specifically noted that Sears' "commitment to this transaction is contingent upon the said infrastructure being provided." (See Exhibits 23 and 27 to Memorandum in Opposition to Motion for Summary Judgment, Volume I).

filing of suit to be deemed a putting in default, the suit must necessarily seek performance as an alternative basis of relief. *Id.* at 1125 n.3. In this matter, while only alluded to by Sears, the record reveals that Newport never placed the Defendant in default and, consequently, may not seek damages from Sears.

Neither the complaint nor any of the four amended complaints filed by Newport seek performance by Sears but rather, all, request relief in the form of money damages. Furthermore, the record contains no evidence of Newport having placed Sears in default by any of the other means permitted under Louisiana law. The facts before the court establish that Newport filed this suit in June 1986 without any prior notice at all to the Defendant. The court, even assuming that an obligation with a suspensive condition had been created by the January 9, 1985 letter, finds that Newport's failure to place Sears in default disposes of its claims involving the formation of a purported obligation and the enforcement thereof.

The court, having thoroughly considered the record before it, finds that: (1) Sears and Newport failed to enter into a binding lease agreement and (2) the vice of error vitiates Sears' consent as to both any purported lease agreement or other form of legal obligation. Furthermore, even assuming that Sears incurred an obligation by providing the January 9, 1985 letter, the undisputed facts establish that it met any "suspensive condition" in the letter agreement to work toward a more comprehensive agreement and evinced no interest to the contrary. In the alternative, the court finds that Newport failed to place Sears in default and, as a result, is barred from reliance on any purported conditional obligation. Plaintiff's first and third causes of action based on contract, therefore, must fail as no material issue of fact in dispute supports these claims as a matter of law.

II. Detrimental Reliance

The court next addresses Sears' conteniton that the record also fails to support Newport's second cause of action based on detrimental reliance. In doing so, the court finds an absence of material facts in dispute to preclude summary judgment on this cause of action.

Sears, in support of its arguments, contends that "Newport's claim of detrimental reliance fails not only for the lack of a clear and unambiguous promise, but also because any reliance by Newport on Sears' so-called 'promise' was not reasonable and foreseeable." R. at 548 (Memorandum in Support of Motion for Summary Judgment at 48). Conversely, Newport argues that it need only establish reliance on "Sear's act, representation, statement, or promise." R. at 550 (Memorandum in Opposition to Motion for Summary Judgment at 58). Furthermore, Newport contends that it reasonably relied to its detriment on the promises and conduct of Sears to complete the transaction involving the Newport site. The court does not entirely embrace either party's statements of the law but conclusively finds Newport's claim of detrimental reliance to be barren of support in the record.

Article 1967 of the Louisiana Civil Code provides the substantive basis for Newport's detrimental reliance claim and states:

> Cause is the reason why a party obligates himself.
>
> A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

La. Civ. Code Ann. art. 1967 (West 1987). The Louisiana legislature enacted this codal provision during the

1984 legislative session and provided for it to become effective on January 1, 1985. 1984 La. Acts 331; see *Breaux v. Schlumberger Offshore Services*, 817 F.2d 1226, 1229 (5th Cir. 1987). In this instance, the parties devote much of their discussions to whether article 1967 requires a specific promise or, if more liberally construed, permits mere conduct to support a claim of detrimental reliance.

The court, however, finds these expansive discussions on whether article 1967 limits a party's reliance to an actual promise to be irrelevant to the facts at hand. The Fifth Circuit in Breaux defined the essential elements of a detrimental reliance claim as follows: "(1) a representation by conduct or word; (2) justifiable reliance thereon; and (3) a change of position to one's detriment because of the reliance." *Id.* at 1230; see *Stokes v. Georgia-Pacific Corp.*, 894 F.2d 764, 768 (5th Cir. 1990). Furthermore, Louisiana law provides that a claim of detrimental reliance sounds in contract rather than tort. *Id.* at 770; see *Flynn v. Nesbitt*, 771 F. Supp. 766, 768 (E.D. La. 1991). These statements accurately represent Louisiana law on the subject. But, even so, the facts fail to establish justifiable reliance on any promise or conduct and a change of position by Newport to its detriment.

The parties' dispute on the first element of detrimental reliance essentially revolves around semantics. Newport avers that Sears' conduct or words led to its justifiable reliance thereon and a change in position to the Plaintiff's detriment. Sears argues that, because Louisiana law requires an explicit promise, no claim for detrimental reliance arises out of the facts before court.

Newport and Sears, however, misplace their arguments in that, even if the first element of detrimental reliance may be satisfied through conduct and words, article 1967 requires such conduct or words to create a promise or representation upon which a party justifiable relied. Here, notwithstanding whether the court looks to Sears' state-

ments, actions, or explicit promises, the record fails to establish that the latter two elements of detrimental reliance have been satisfied or that a material issue of fact precludes summary judgment on this cause of action.

Newport would have this court find that, because Sears provided the letter of January 9, 1985, and subsequently continued negotiations with Newport, Sears should be held accountable for the expenses incurred and profits lost by Newport resulting from the failure to consummate the transaction. The undisputed facts prove, however, that, at most, Sears agreed to enter into a complex transaction subject to the broad and general terms included in the letter of intent and the preparation of a comprehensive lease agreement. No representations by conduct or otherwise establish that Sears agreed to be held accountable for the damages allegedly sustained by Newport when the deal collapsed. Furthermore, in the court's view, the deal collapsed because of Newport's failure to enter into negotiations with Sears over the terms of the lease supplied in March 1986 or otherwise pursue Sears' detailed proposal as would normally having been expected in such commercial undertakings.

The court further finds that, even if some representation or promise by conduct or words could be inferred, sufficient to subject Sears to potential liability for alleged damages sustained by Newport, the facts fail to support a genuine dispute over Newport's reliance on such representation or promise. Newport knew that the consummation of a final lease agreement depended on the drafting of comprehensive legal documentation. Surely Newport also knew that the final terms of this transaction would involve complex negotiations over numerous unsettled issues. The court finds no support in the case law or the record to establish justifiable reliance (or even a disputed fact issue over justifiable reliance) by Newport that the January 9, 1985 letter would inevitably lead to a final written lease agreeable to both parties and, therefore, a basis for the cause of action at dispute.

The facts further fail to support that Newport relied to its detriment on any alleged representation or conduct of Sears. Unlike the plaintiff in Breaux, Newport makes no allegation (and the facts fail to support) that the agreement with Sears precluded it from negotiating with other parties. In fact, while the transaction with Sears might have been the centerpiece of the Newport Industrial Park, the tract of land involved other acreage suitable for development and upon which Newport had entered into at least one other lease transaction. Furthermore, Newport hotly disputes the availability of funding for the site and avers that, even without a final written lease from Sears, one investor committed a substantial sum of money satisfactory to fund development on the Newport tract. Thus, while attempting to create a factual dispute over whether a detriment might be derived from the record, Newport undermines its own position.

The court further notes Newport's misplaced reliance on the Breaux decision. In Breaux, the Fifth Circuit affirmed the trial court's decision holding a potential tenant liable on the theory of detrimental reliance because the tenant's agent entered into an oral lease agreement with the landlord. *Breaux*, 817 F.2d at 1229-32. This case, however, may be distinguished on several grounds: (1) Sears and Newport never executed a written lease or confected an oral lease agreement; (2) Sears and Newport had not agreed as to the final terms of the lease, including the price and square footage to be leased; (3) Newport never has attempted to mitigate its damages by developing the project with another party. Thus, unlike in Breaux, the facts before the court fail to establish a cognizable cause of action based on detrimental reliance.

The court, therefore, finds no material issues of fact in dispute to preclude summary judgment on Plaintiff's claims arising out of article 1967 of the Louisiana Civil Code. Newport's second cause of action, therefore, does not withstand scrutiny upon a review of the facts even with all inferences in its favor.

III. Fraudulent Misrepresentation

The court's finding that the parties failed to enter into a contract effectively disposes of Newport's third cause of action based on fraudulent misrepresentation. But, even if a contract had been executed or some other obligation incurred, this cause of action would not withstand the standards governing summary judgment.

Newport unsuccessfully attempts to convince the court that, because fraud under article 1953 pertains to all obligations and not only contractual obligations, the facts establish a viable cause of action for fraud. Article 1953 of Title IV (Conventional Obligations and Contracts), Book III (Of the Different Modes of Acquiring the Ownership of Things) states: "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." La. Civ. Code Ann. art. 1953 (West 1987). The Plaintiff's third cause of action sounds in contract. In particular, the Louisiana courts have discerned the following two elements to be necessary to sustain a claim of fraudulent misrepresentation deriving out of Louisiana's law of obligations: (1) the intent to defraud or gain an unfair advantage and (2) proof of actual or probable damage. *Hall v. Arkansas-Louisana Gas Co.*, 368 So.2d 984, 993 (La. 1979); *Dutton & Vaughan, Inc. v. Spurney*, 600 So. 2d 693, 698 (La. Ct. App. 1992). Here, the facts fail to establish a genuine dispute over either element.

The court first finds no evidence of "intent to defraud" on the part of Sears. Newport apparently claims that Sears' intent to defraud it occurred both before and after execution of the letter of intent executed in January 1985. First, Newport claims that Sears never intended to pay more than $2.48 per square foot as represented

in the letter.[8] In addition, the Plaintiff again places great reliance on the "drag our feet" notation placed at the bottom of an internal Sears' memorandum. The inferences drawn by Newport from these alleged acts of "intent to defraud", however, fail to convince the court that they can support even a triable issue of fact sufficient to preclude summary judgment on this issue.

The Louisiana Court of Appeals, Fourth Circuit, in Spruney recently noted: "Fraud . . . cannot be predicated on unfulfilled promises or statements as to future events." 600 So. 2d at 698. An allegation of fraud however, "may be predicated on promises made with the intention not to perform at the time the promise is made." *Automatic Coin Enters., Inc. v. Vend-Tronics, Inc.*, 433 So. 2d 766, 768 (La. Ct. App. (emphasis in original), cert. denied, 440 So. 2d 756 (La. 1983). But, the mere failure to sign a contract does not constitute fraud but a breach of promise. *Green v. Louisiana Highway Comm'n*, 3 So. 2d 236, 238-39 (La. Ct. App. 1941). Under the applicable jurisprudence, Newport, therefore, must prove more than a mere failure to consummate the final written lease agreement.

The allegations by Newport, however, bear out no more than the fact that the parties never executed a final written lease agreement. Viewed even in the light most favorable to Newport, it could be argued that Sears did "drag" its feet and perhaps even risked breaching a promise to enter into a final lease agreement; but, the court's earlier findings relative to Sears' conduct in this regard effectively preclude a cause of action for fraud based on such delay. As previously stated, Sears decided to reevaluate the Newport project after a management change, and the facts established that it advised Newport on several occasions of such reevaluation. In fact, the record

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[8] This claim is astounding when viewed in the light of the clear language of paragraph 7 of the Newport-drafted letter of January 9.

supports that, until March 1986 and possibly thereafter, Sears stood ready to work toward a consummation of the negotiations undertaken by the parties and the development of a facility in some form. Newport abruptly ceased such negotiations by ignoring Sears' March 1986 lease proposal and filing suit shortly after this proposal.

The court, therefore, finds an absence of facts, genuinely disputed or otherwise, to support a claim for fraud based on the law of obligations. As a result, notwithstanding the court's previous finding of no obligation to have been incurred by Sears, Plaintiff's third cause of action also fails to survive summary judgment.

IV. Unfair Trade Practices and Consumer Protection Law

The court next turns to a review of Plaintiff's claims under Louisiana's Unfair Trade Practices and Consumer Protection Law (the "Unfair Trade Practices Act" or the "UTPA"). La. Rev. Stat. Ann. §§ 1401-1418 (West 1987 & Supp. 1992). In doing so, it again finds that the facts and law fail to support Newport's fourth cause of action.

Sears attacks Plaintiff's claims alleged under the Unfair Trade Practices Act on two grounds. First, the Defendant contends that Newport fails to fall within the class of persons intended to be protected by this law. Furthermore, according to Sears, no alleged facts in dispute support a claim under this statute. Newport vehemently disputes both contentions.

The Louisiana Unfair Trade Practices Act prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." *Id.* § 1405 A (West 1987). The act further creates a private right of action on behalf of any person involved in a consumer transaction. *Id.* § 1409. Both the state and federal courts have recognized that the practices prohibited by the act evade precise definition. See *W.A. Offshore Equipment Co. v. Parmatic Filter Corp.*, 767

F. Supp. 125, 126 (E.D. La. 1991); *Jarrell v. Carter*, 577 So. 2d 120, 123 (La. Ct. App.), cert. denied, 582 So. 2d 1311 (La. 1991). Consequently, the determination of what constitutes an unfair trade practice must be done on a case-by-case basis. *Roustabouts, Inc. v. Hamer*, 477 So. 2d 543, 548 (La. Ct. App. 1984). In this instance, the court, however, must first determine whether the UTPA even applies.

Section 1402 of Title 51, Louisiana Revised Statutes, explains the definitions generally applicable through the Unfair Trade Practices Act. La. Rev. Stat. Ann. § 1402 (West 1987). The act defines "person" as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity." *Id.* § 1402(8). The UTPA, however, explains a "consumer transaction" as "any transaction involving trade or coerce to a natural person, the subject of which transaction is primarily intended for personal, family, or household use." *Id.* § 1402(3); see *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*, 922 F.2d 220, 225-26 (5th Cir. 1991) (noting definition of "consumer transaction" and failure of parties therein to be business competitors). While Newport apparently meets the UTPA's definition of "person", Newport and Sears were not business competitors and the transaction at issue fails to meet the definition of a "consumer transaction". Newport, therefore, is not within categories of persons entitled to protection under this act.

The court, however, further finds that, even should the UTPA afford Newport protection, the facts fail to support a cause of action thereunder. The Louisiana state courts have held that "a practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious to consumers and consumers include business competitors." *Hamer*, 447 So. 2d at 548. Newport fails to allege any such practice and the undisputed facts fail to support one.

No material issues of fact in dispute establish a cause of action under the Unfair Trade Practices Act. The court, therefore, finds the Plaintiff's claims under this Louisiana statute to be unsupported as a matter of law.

V. International Fraudulent Misrepresentation

Plaintiff's fifth cause of action alleges liability based on an intentional fraudulent misrepresentation. The record, however, fails to support a genuine disputed fact precluding summary judgment on this claim.

Sears essentially argues that, although it advised Newport of its desire to delay or downsize the Newport project, the Defendant agreed to proceed at all times. According to Sears, the Plaintiff's failure to accept its invitation to negotiate based on the lease proposed in March 1986 refutes any cause of action based on intentional fraud. Newport, however, again contends that Sears never intended to proceed under the terms of the January 9, 1985 letter and, at a minimum, material issues of fact surround Sears' intent in this regard.

The court finds Newport's allegations to be unsupported by the record and its claims of intentional fraud to be unsubstantiated. The Fifth Circuit in *Abell v. Potomac Insurance Co.*, 858 F.2d 1104 (5th Cir. 1988), vacated on other grounds, 492 U.S. 914 (1989), explained that fraudulent misrepresentation arises out of article 2315 of the Louisiana Civil Code and requires "(1) a misrepresentation of a material fact, (2) made with the intent to deceive, and (3) causing justifiable reliance with resultant injury." *Id.* at 1131 n.33. In this case, Newport's repeated lack of specificity undermines its position. The Plaintiff presumably relies on its unsupported allegations that Sears never intended to proceed with the Newport project—even at the time it provided the January 9, 1985 letter.

The record, as noted repeatedly by the court, fails to contain a triable issue of fact on this issue whether in

the context of this cause of action or any of the others asserted by Newport. In addition, the Plaintiff fails to establish actual reliance on any purported material misrepresentation. See *Abell*, 858 F.2d at 1131. The Plaintiff's lack of specificity and the absence of facts supporting its claims prove fatal.

Sears, in the court's view, made no material misrepresentations with an intent to deceive causing justifiable reliance and, even viewed in a light most favorable to the Plaintiff, the inferences drawn from the facts fail to prove otherwise. The fifth cause of action based on an intentional fraudulent misrepresentation falls to summary judgment.

VI. Negligent Misrepresentation

The sixth cause of action asserts a claim for negligent misrepresentation.

The Fifth Circuit in Abell defined the requisite elements for negligent misrepresentation under article 2315 as follows: (1) a duty to provide correct information; (2) a breach of such duty; and, (3) a resulting injury to the plaintiff. 858 F.2d at 1131 n.33 As swing that these arms-length sophisticated commercial negotiators owed one another a duty to disclose such purely internal matters as Sears' management changes and policy reviews, the only perceived incorrect information allegedly provided by Sears presumably arises out of its alleged "hidden" intent to abandon the Newport development and force the Plaintiff into giving up during the negotiations. Notwithstanding Newport's claims of "well-documented" misrepresentations and harm, the court fails to find any, and therefore no genuine fact issue to preclude summary judgment on this claim.

Sears, at best, expressed an intent to enter into a "build-to-suit" transaction with Newport for a warehousing facility. Subsequently, the Defendant decided to re-evaluate its facility needs and sought to delay or down-

size the project. In March 1986, Sears honored the only arguable obligation incurred by it by the submission of a proposed draft lease. Newport expressed its dissatisfaction with the proposed lease by ignoring it and filing suit in June 1986 rather than even attempting to negotiate more desirable terms.

These bare facts hardly establish a claim for negligent misrepresentation under Louisiana law. As such, the plaintiff's sixth and final remaining cause of action fails to survive the scrutiny of summary judgment.

VII. Damages

The Defendant, in the alternative, presents the argument that, even if liability might be imposed on it, this court should deem the damages alleged by Newport to be too speculative under Louisiana law. The court cannot disagree.

Sears, through incorporation by reference, adopts previous memoranda provided in support of summary judgment on the issue of damages. R. at 495-496, 548 (Memorandum in Support of Motion for Summary Judgment at 18 n. 5). Newport opposes summary judgment on the issue of damages by arguing that this determination should be left to the trier of fact. Furthermore, the damages alleged by Newport amount to $62,052,384 and include: (1) $5,124,559 for out-of-pocket expenses; (2) $12,037,984 for lost public monies; and (3) $44,889,841 for lost profits.

This court, in previously addressing the issue of damages under Plaintiff's RICO claims, noted that "the generalized damages sought by Newport are, at best, speculative and based on assumed facts finding no support in the record." *Newport Ltd.*, 739 F. Supp. at 1082-83. In this instance, the court finds that Plaintiff has done no better with respect to its state law claims and the alleged damages arising thereunder.

The Supreme Court of Louisiana in Hall explained the standard for damages based on contractual actions as follows:

> Actual damages arising from a breach of contract must be proven; they cannot be merely speculative or conjectural. . . . It must appear reasonably certain that the amount of damages rests upon a certain basis. Such proof need be only by a preponderance of the evidence; proof by direct or circumstantial evidence is sufficient to constitute a preponderance of when, taking the evidence as a whole, such proof shows that the facts or causation sought to be proved is more probable than not. . . . The sufficiency of proof of damages must be determined in relation to the particular contract at issue and the circumstances surrounding its breach. The question of proof of damages becomes a matter for decision in each individual case.

368 So. 2d at 991. In Stokes, the Fifth Circuit addressed damages in the context of a detrimental reliance claim and noted that "lost profits need not be determined with mathematical precision. Reasonable certainty suffices to permit a court to determine the extent of damages." 894 F.2d at 770.

Thus, while the court recognizes that damages inherently involve some speculation, the Plaintiff must establish damages to at least some degree of certainty. Pure surmise and unsupported assertions will not do.

Newport, notwithstanding its arguments to the contrary, fails even the most minimal test for specificity in this action. First, the court notes its findings herein relative to the lack of any material fact issues in dispute supporting a cognizable cause of action. But, even assuming, arguendo, that liability could be imposed by any one of the asserted causes of action, the court is hard-pressed to find the evidenec of damages alleged; indeed, such claims find no viable support in the record. Of specula-

tion there is much; of hard evidence, none to the certainty our law requires.

The Plaintiff essentially cites this court to three exhibits provided by Dr. Michael A. Conte of the University of New Orleans. R. at 550 (Memorandum in Opposition to Motion for Summary Judgment at 80, Exhibits 109-111). In attempting to support both out-of-pocket loss and lost public monies, Newport relies on two one-paragraph letters supplied by Dr. Conte stating the damages allegedly sustained by Sears' "withdrawal" from the Newport Industrial Project. These letters, however, have no supporting documentation Provided with them. Furthermore, excerpts from Dr. Conte's deposition testimony supplied by Plaintiff fail to substantiate that Newport has calculated damages specifically limited to and deriving from Sears' alleged withdrawal.[9]

The calculation of future lost profits proves even more speculative. First, the parties never agreed upon a final lease agreement and any damages arising from Sears' alleged "withdrawal" would derive from conjecture and speculation. Furthermore, such damage claims fail to take into account that Newport could have entered into a transaction with another party and mitigated its damages. It would be unconscionable to allow a party to claim the type of damages alleged by Newport where no apparent effort to mitigate has been undertaken.

The court, therefore, finds that, under Louisiana law, the Plaintiff fails to raise a triable issue of fact as to damages. Newport's case lacks both causation and itemization to at least some reasonable degree of certainty. In this instance, the court cannot ignore a duty imposed on it by law to require proof—direct or circumstantial, —but at least some proof—of alleged damages. This

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[9] "Withdrawal" is an unfortunate and inappropriate term. It usually depicts some kind of joint undertaking; development of the Newport Project did not involve Sears other than as a potential tenant.

Court will not leave such determination to a jury for speculation and conjecture.

CONCLUSION

This case represents one with a long and strained history in the federal court system. The sheer amount of discovery undertaken and the expense incurred in this case made the court's consideration of summary judgment a particularly careful and thorough deliberative process. Summary judgment, however, must be applied where a party fails to establish at least minimal material facts sufficient to support the imposition of liability on an adversary viewed in a light most favorable to them; its calculation of damages must find at least some support in the record. Notwithstanding the mountainous reams of paper before the Court, the absence of a genuine material fact mandates the result arrived at today. For the reasons herein, the motion for summary judgment filed by Defendants Sears, Roebuck & Co. is hereby GRANTED.

Judgment shall be entered dismissing the Plaintiff's remaining claims based on state law causes of action.

IT IS SO ORDERED.

New Orleans, Louisiana, this 9th day of September 1992.

GEORGE ARCENEAUX, JR.

United States District Judge

JUDGMENT

This action came on for hearing before the court, Honorable George Arceneaux, Jr., District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff, Newport Limited, take nothing, that

the action be dismissed on the merits, and that each party bear its respective costs.

New Orleans, Louisiana, this 9th day of September 1992.

GEORGE ARCENEAUX, JR.

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3832

NEWPORT LIMITED, A Partnership in Commendam,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK & COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

February 1, 1994, Decided
February 1, 1994, Filed

Before KING, HIGGINBOTHAM, and DEMOSS, Circuit Judges.

PER CURIAM; PATRICK E. HIGGINBOTHAM

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Patrick E. Higginbotham
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1741

In The

Supreme Court of the United States

October Term, 1993

SEARS, ROEBUCK AND CO.,

Petitioner,

versus

NEWPORT LIMITED,
A PARTNERSHIP IN COMMENDAM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF NEWPORT LIMITED TO PETITION BY SEARS, ROEBUCK AND CO. FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether review on writ of certiorari is appropriate where:

1. The district court did not hold any evidence to be inadmissible;

2. The appellate court expressly found that no evidence had been excluded as inadmissible;

3. No conflict exists with any decision of this Court or of other circuits;

4. The issue involved is whether in this particular case the evidence presented in opposition to a motion for summary judgment is sufficient to withstand the grant of such motion.

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No. 93-1741

In The

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October Term, 1993

SEARS, ROEBUCK AND CO.,

Petitioner,

versus

NEWPORT LIMITED,
A PARTNERSHIP IN COMMENDAM,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

OPPOSITION OF NEWPORT LIMITED TO PETITION BY SEARS, ROEBUCK AND CO. FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Newport filed this action against Sears in 1986, alleging violations of state law and demanding a jury trial. [R. 305.] Jurisdiction was founded on diversity of citizenship. 28 U.S.C. § 1332. Early in the suit, Sears moved for summary judgment on all claims; the district court denied the motion because "disputed genuine issues of material fact exist as to the intent and performance of the parties." [R. 741.]

In October 1988, Newport added a claim for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, thus invoking federal question jurisdiction. 28 U.S.C. § 1331. [R. 3228.] In November 1988, Sears filed a Rule 12(b)(6) motion to dismiss the RICO claim, followed in February 1989 by its second motion for summary judgment on all claims. [R. 3893 and R. 4178.] After 14 months, the district court dismissed the RICO claim; at the same time, it concluded that the parties were not diverse under *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S. Ct. 1015 (1990). *Newport Limited v. Sears, Roebuck and Co.*, 739 F. Supp. 1078 (E.D. La. 1990). The lower court then declined to exercise pendent jurisdiction, dismissed as moot Sears' second motion for summary judgment, and dismissed the state law claims without prejudice. *Id.*, at 1084.

Both parties appealed. The Fifth Circuit upheld dismissal of the RICO claim and agreed with the lower court's determination that the parties were not diverse. The court concluded, however, that the district judge had abused his discretion by dismissing the pendent state law claims. *Newport Limited v. Sears, Roebuck and Co.*, 941 F.2d 302, 308 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1175 (1992). The matter was remanded to the district court.

In May 1992, Sears filed its third motion for summary judgment, advancing the identical arguments and supporting exhibits that it had relied upon in its February 1989 motion. At no time did Sears move to exclude Newport's expert evidence on the issue of damages. Nor did Sears present contrary damage evidence, or challenge the methodology utilized by Newport's expert. Nonetheless,

on September 9, 1992, the district court granted Sears' motion and entered judgment dismissing all claims. *Newport Limited v. Sears, Roebuck and Co.*, No. 86-2319, slip op. (E.D. La. September 9, 1992). [Appendix to Sears' Petition, at 25a.]

Newport appealed. On October 29, 1993, the Fifth Circuit issued its ruling reversing the grant of summary judgment and remanding for trial on the merits as to all claims. The appellate court expressly found that Newport had raised genuine issues of material fact from which a jury could reach a conclusion favorable to Newport. *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058 (5th Cir. 1993). [Appendix to Sears' Petition, at 1a.] On the issue of damages, the Fifth Circuit specifically declared that "we hold that Newport's evidence, which Sears failed to rebut, raised a genuine issue of material fact." [*Id.*, at 22a.]

Sears petitioned for panel rehearing and suggested rehearing *en banc*. As the primary thrust for its suggestion for rehearing *en banc*, Sears argued that Newport's evidence of damage had been deemed inadmissible by the district court. Apparently in response to this new argument, but without changing its holding, on January 28, 1994 the unanimous Fifth Circuit panel of Judges Higginbottham, King and DeMoss clarified its earlier ruling. This clarification made clear the Fifth Circuit's rejection of Sears' argument that Newport's expert evidence had been deemed inadmissible, noting that "here, the district court has not excluded expert evidence as inadmissible. . . . " [*Id.*]

Several days later, Sears' petition for panel rehearing was denied. [*Id.*, at 56a.] Moreover, "no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, . . . the Suggestions for Rehearing En Banc are DENIED." [*Id.*] On May 2, 1994, Sears filed this Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

1. The court of appeals' decision does not conflict with any decision of this Court, and this case does not present any special or important reason for the grant of a writ of certiorari. [Rule 10 of the Supreme Court of the United States.]

2. At no time was Newport's expert testimony as to damages excluded or deemed inadmissible. The issue before the district court was sufficiency, not admissibility.

3. Sears misconstrues the record. The Fifth Circuit did not ignore but rather directly addressed the issue of admissibility, and determined that the district court had "not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993).

4. In essence, Sears seeks a writ of certiorari so that this Court can determine whether, on the facts and record of this specific case, a court of appeals has properly construed a ruling of a trial court. Such issue does not warrant the grant of a writ of certiorari.

5. In any event, Sears did not establish that Newport's expert testimony on damages should be excluded. The testimony was relevant and reliable. Newport's expert utilized a well-founded methodology and relied on the type of data other experts in the field rely on in forming opinions on the subject. Sears, on the other hand, offered no evidence whatsoever that the expert's factual basis was inaccurate or that his methodological approach was incorrect.

ARGUMENT

Review on writ of certiorari "is not a matter of right," but "will be granted only when there are special and important reasons therefor." [Rule 10.1 of the Supreme Court of the United States.] Thus, review often is limited to the situation in which a court of appeals "has decided a federal question in a way that conflicts with applicable decisions of this Court" [*id.*, Rule 10.1(c)], or "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." [*Id.*, Rule 10.1(a).] Given those considerations, review on writ of certiorari is not appropriate here.

Sears seeks review essentially by declaring that the Fifth Circuit decision below is "in conflict with the recent decision of this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786 (1993)."

[Sears' Petition at (i).][1] Sears attempts to confect a conflict by asserting that the trial court specifically excluded Newport's expert testimony on damages, and that the Fifth Circuit erred both by refusing to acknowledge this exclusion and by considering such testimony without first determining the reliability of the expert opinions or reviewing the district court ruling for manifest error. Sears' entire argument thus rests on the assumption that the district court found Newport's expert evidence on damages to be inadmissible.

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[1] Although Sears purports to present two questions for consideration, in fact the second question is dependent on the answer to the first. In the second question, Sears rhetorically asks whether summary judgment may be defeated by court speculation "as to evidence the opposing party might hypothetically offer at a subsequent trial, rather than limiting itself to the evidence actually proffered in opposition to the motion for summary judgment?" [Sears' Petition at (i).] Obviously, reliance on hypothetical future evidence is inappropriate, *see, e.g., Wilcox v. United States*, 983 F.2d 1071, 1073 (6th Cir. 1992); Newport does not contend otherwise. Sears' position that the Fifth Circuit relied on hypothetical future evidence, however, is founded on its incorrect view that all damage evidence presented was deemed inadmissible by the district court, and thus that denial of summary judgment necessarily had to be founded on evidence not yet in the record. Because the district court did not rule any expert evidence inadmissible, as the appellate court expressly noted, the grant of summary judgment properly was reversed based on evidence actually presented, not on undefined, hypothetical evidence that might be offered at some later date. At no time did the appellate court depart from "the accepted and usual course of judicial proceedings" so as "to call for an exercise of this Court's power of supervision." [Rule 10.1(a) of the Supreme Court of the United States.]

Sears' assumption is unfounded. The issue in dispute below was sufficiency of evidence on a motion for summary judgment, not admissibility. The district court did not exclude Newport's expert testimony as to damages. Indeed, Sears never challenged the admissibility of Newport's expert reports and related evidence, and never moved to exclude any evidence offered by Newport in opposition to Sears' third motion for summary judgment.[2] The lower court merely found Newport's evidence to be of insufficient weight. The Fifth Circuit properly reviewed this determination and held that the evidence in fact was sufficient to withstand Sears' motion for summary judgment. The Fifth Circuit's conclusion was not surprising, given that Sears submitted no evidence – expert or otherwise – to challenge Newport or to support summary judgment on damages. Because questions concerning an appellate court's determination of the sufficiency of evidence generally do not present the "special and important reasons" for which certiorari is reserved [Rule 10.1 of the Supreme Court of the United States], Sears' request for review should be denied. *See, e.g., Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111, 80 S. Ct. 173, 176 (1959) (Stewart, J., concurring) (review of case "in which the sole issue is sufficiency of

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[2] Sears first questioned the admissibility of Newport's expert evidence on appeal, after seven years of litigation. The Fifth Circuit found *Daubert* and *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1280 (1992), inapposite because the issue here concerns sufficiency, not admissibility. The appellate court expressly noted that "the district court has not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993). [Appendix to Sears' Petition, at 22a.]

the evidence seems . . . not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here"); *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")

Moreover, the district court's conclusion of insufficiency as to damages was founded in large part on an erroneous view of the law on the issue of liability. For example, the lower court held that, as a matter of law, "the parties never agreed upon a final lease agreement and [therefore] any damages arising from Sears' alleged 'withdrawal' would derive from conjecture and speculation." [R. 6284-6318 (Slip Op.) at 33 (Appendix to Sears' Petition, at 53a); *see also id.*, at 33 n.9.] The Fifth Circuit, however, rejected the conclusion that there was no "final lease agreement" as a matter of law. *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1067 (5th Cir. 1993). [Appendix to Sears' Petition, at 14a-16a.] Because Sears does not challenge that reversal here, the district court's grant of summary judgment therefore is without sufficient foundation in any event.

Sears attempts to create a conflict with *Daubert* by twisting the district court's decision from something it was – a reversible ruling based on erroneous conclusions regarding the law and the sufficiency of the evidence – into something it was not – an evidentiary ruling excluding certain testimony. Sears asserts, for example, that district court language pertaining to that court's perception of the sufficiency of evidence "necessarily" meant that the court "found the evidence offered by Newport to be inadmissible." [Sears' Petition at 8.] Sears, however,

fails to cite to a single explicit ruling in the record actually holding Newport's expert evidence to be inadmissible.

Sears also attempts to create a conflict with *Daubert* by claiming that the appellate court "inexplicably refused to even acknowledge" and "failed to address" the issue of admissibility. [*Id.*, at 9.] Sears is incorrect, and its position both is disingenuous and borders on a misrepresentation to this Court. The issue of admissibility, rather than being "ignored" [*id.*, at 10], was directly addressed by the Fifth Circuit, which declared that "here, the district court has not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993). [Appendix to Sears' Petition, at 22a.]

Based on this clear Fifth Circuit pronouncement, a careful reading of Sears' Petition reveals that Sears merely disagrees with the Fifth Circuit's conclusion that the expert evidence was never held inadmissible. The record, however, is devoid of any indication that Sears ever moved to exclude such evidence, or that the district court ever expressly stated such evidence to be inadmissible. The Fifth Circuit's determination clearly is correct. Even if it were not, however, a party's disagreement with an appellate court's analysis of whether a lower court made a particular ruling does not involve important principles of law, protect public interests, or create true conflicts with prior decisions of this Court.[3] In short, Sears'

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[3] That the issue presented by Sears is one based on the facts and record of this particular case, and does not constitute the "special and important reasons" for which certiorari is reserved [Rule 10.1 of the Supreme Court of the United States], is

complaint does not rise to the level of importance ordinarily reserved for review on a writ of certiorari.

It is worth noting, too, that Sears has not established – and, indeed, cannot establish – that Newport's expert testimony on damages should be excluded.[4] Under *Daubert*, Sears could establish that the testimony is inadmissible by showing that it is irrelevant, that it is unreliable, or that its prejudicial value substantially outweighs its probative value. 113 S. Ct. at 2794-95, 2798-99. Sears has never argued that Newport's expert testimony is irrelevant or unfairly prejudicial. Nor has Sears established that Newport's expert testimony is unreliable.

The reliability of expert testimony may be established in a variety of ways. Generally, reliability is established

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reflected in the fact that the Fifth Circuit at no time has attempted to depart from the standard or dictates set forth by this Court in *Daubert v. Merrell Dow Pharmaceuticals*, ___ U.S. ___, 113 S. Ct. 2786 (1993). Indeed, the Fifth Circuit has given every indication of strict adherence to *Daubert*. *E.g.*, *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1994) (affirming district court exclusion of expert evidence under *Daubert*).

[4] Even with the expert testimony excluded, however, the Fifth Circuit's opinion would remain correct. On summary judgment, Sears bears the burden of demonstrating an absence of genuine dispute as to material facts, a burden Sears failed to meet. Indeed, the record is replete with evidence of Newport's damages, even without reference to the expert's opinion, thereby establishing factual issues. The evidence shows, for example, that Newport expended substantial sums to clear the site for the Sears facility, to prepare access to the site from the public highways, to procure Foreign Trade Zone status for the Sears facility, and to undertake numerous other efforts to prepare the site. [R. 5052 at Exh. 4; R. 6155 at Exhs. 57 and 88.]

by showing that the expert used a well-founded methodology and that he relied on the same type of data other experts in the field rely on in forming opinions on the subject. *See, e.g., Daubert*, 113 S. Ct. at 2795; *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1476 (5th Cir. 1993); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110-11 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1280 (1992). Newport's expert reports and testimony are based on multiple regression analyses, which experts agree provide a "powerful tool for . . . measuring damages in lost profits cases." 2 R. Dunn, *Recovery of Damages for Lost Profits*, § 9.2, at 536 (1992); *see also Cotton Bros. Baking Co. v. Industrial Risk Insurers*, 941 F.2d 380, 391 (5th Cir. 1991) (upholding jury award of lost profits based on expert economist's regression analysis). Moreover, Newport's expert reports are based on a thorough examination of comparable projects, invoices, and public documents prepared by public bodies, which is the type of data experts consider in forming opinions on damages. *See, e.g., Crawford v. Gray & Associates*, 493 So. 2d 734, 744 (La. App. 2nd Cir.), *cert. denied*, 497 So. 2d 1012, 1013 (1986) (expert testimony on lost profits based on financial performance of comparable convenience stores); *Galloway v. Tenneco Oil Co.*, 313 So. 2d 317, 322 (La. App. 4th Cir.), *cert. denied*, 318 So. 2d 42 (1975) (expert testimony on lost profits based on profits derived from comparable land sales).

Newport offered the testimony of an expert economist, Dr. Michael Conte, who earned a bachelors degree in economics from Yale University and both a masters and a doctoral degree in economics from the University

of Michigan. Dr. Conte quantified three categories of damage: (1) out-of-pocket costs, (2) lost future profits, and (3) lost public monies. Newport's claims for out-of-pocket expenses were established through Dr. Conte's careful review of hundreds of invoices documenting expenses incurred by Newport because of Sears' misrepresentations and its failure to proceed in good faith. [R. 6155 at Exhs. 112 and 113.] Lost public monies were directly calculated by Dr. Conte, based on the terms of the federal and state grants to Newport that were contingent on Sears proceeding in good faith. [R. 6155 at Exhs. 57, 110, 114 and 155. *See also* R. 6155 at Exhs. 81 and 88.] To calculate lost profits, Dr. Conte examined extensive data relating to over 600 business, industrial, and mixed-use parks that opened throughout the United States since 1980. [*Id.* at Exh. 116, pp. 158-61.] To calculate an absorption rate (a rate of development) for a park with Newport's characteristics, he performed eight separate regression analyses to identify facilities that closely resembled Newport's. [*Id.* at Exh. 116, pp. 164-68.][5] Dr. Conte further tested for the impact of geographic location, and concluded that the absorption rates for industrial parks in the area encompassing Newport Industrial Park were not statistically distinguishable from those for the country overall. [*Id.* at Exh. 117, pp. 126-28.]

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[5] The characteristics Dr. Conte determined to be the most significant were that the park (1) have access to rail transportation, (2) have access to water transportation, (3) have the capacity to house offices, (4) have little distance to a highway, (5) be a mixed-use business park, (6) not be a research park, and (7) not be a fly-in park.

After a thorough analysis of the data and performance of the regression analyses, Dr. Conte calculated an absorption rate for the Newport facility. [*Id.* at Exh. 111, attached Exh. B, No. 2.] Using this absorption rate, Dr. Conte calculated Newport's gross profits. [*Id.* at Exh. 111, attached Exh. A.] Dr. Conte then reduced the gross profits by traditional factors of development, promotional and related overhead costs to calculate net profits, and then discounted those profits to present value. [*Id.* at Exh. 111, attached Exh. B, No. 2].

The general rule in Louisiana is that, "while damages for lost profits may not be based on speculation and conjecture they need only be proven within a reasonable certainty." *Folds v. Red Arrow Towbar Sales*, 378 So. 2d 1054, 1059 (La. App. 2nd Cir. 1979). Under Louisiana law, "[b]road latitude is given in the proving of lost profits as damages." *Lavigne v. J. Hofert Co.*, 431 So. 2d 74, 76 (La. App. 1st Cir. 1983). Moreover, once Newport proves by a preponderance of the evidence that Sears' wrongful conduct caused some loss of anticipated profits, the jury has discretion to determine the amount, so long as there is some reasonable basis for the determination. *Koncinsky v. Smith*, 390 So. 2d 1377, 1383 (La. App. 3rd Cir. 1980).

In light of these standards, Newport adduced substantial evidence, including expert testimony, on damages. By contrast, Sears offered no evidence whatsoever, whether contrary factual evidence or evidence that the methodological approach of Newport's expert somehow was incorrect. The Fifth Circuit correctly noted that Sears "failed to rebut" Newport's evidence, and remanded for trial on the merits. *Newport Limited v Sears, Roebuck and Co.*, 6 F.3d 1058, 1070 (5th Cir. 1993). [Appendix to Sears'

Petition, at 22a.] Sears was and is not entitled to summary judgment on damages, and its petition for a writ of certiorari should be denied.

CONCLUSION

Sears seeks review on writ of certiorari on the premise that the district court made a specific evidentiary ruling excluding certain expert testimony, and that the Fifth Circuit ignored that ruling, in conflict with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786 (1993). In fact, however, the district court did not render any evidentiary ruling that excluded expert testimony. Rather, the district court considered that expert testimony, merely finding it insufficient to support a claim for damages. The Fifth Circuit specifically considered the issue raised by Sears regarding admissibility, finding that "the district court has not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993). Moreover, the Fifth Circuit reviewed the district court determination of insufficiency, held that the evidence was in fact sufficient to withstand Sears' motion for summary judgment, and reversed the district court. The ruling of

the Fifth Circuit creates no conflict with *Daubert* or other precedent. A review on writ of certiorari is not warranted.

Respectfully submitted,

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No. 93-1741

In The

Supreme Court of the United States

October Term, 1993

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Newport's Response acknowledges that reliance on hypothetical future evidence to defeat a motion for summary judgment is "inappropriate." [Newport response at page 6 f/n 1]. Yet, Newport disingenuously ignores the fact that the district court found Newport failed to present any admissible evidence in response to Sears' motion for summary judgment with respect to Newport's damages claims. Thus, the district court referred to the evidence offered by Newport in support of its damages claims and held.

> "[T]he court cannot ignore a duty imposed on it by law to require proof -- direct or circumstantial, -- but at least some proof -- of alleged damages. This Court will not leave such determination to a jury for speculation and conjecture."

(Appendix to Sears' Petition at pages 53a - 54a). Given that Newport offered "evidence" in the form of exhibits prepared by

its expert on the issue of damages allegedly sustained by Newport, the district court, by holding as it did, necessarily found the "evidence" offered by Newport inadmissible and that only hypothetical future evidence could support Newport's claim of damages.

Consequently, the Fifth Circuit's reversal of the summary judgment in favor of Sears on the issue of damages is premised either upon a complete misunderstanding of the district court's evidentiary findings or upon the erroneous conclusion that summary judgment can be denied based on the expectation of hypothetical future evidence. In either case, the Fifth Circuit's reversal was erroneous, and this Court should grant Certiorari to review it.

A situation strikingly similar to the one before the district court on Sears' motion for summary judgment on the issue of damages also was the subject of *Benavides v. County of Wilson*, 955 F.2d 968, 971 (5th Cir. 1992), a case cited and discussed in Sears' Petition, but wholly ignored by Newport in its Response. In *Benavides*, a plaintiff, responding to a motion for summary judgment, offered "expert" testimony. The district court did not expressly rule upon the "admissibility" of that expert's opinions, but granted defendant's motion for summary judgment because the expert opinion was "insufficient to raise a fact issue as to [the] existence of an unconstitutional policy or custom." *Benavides v. County of Wilson*, 955 F.2d 968, 971 (5th Cir. 1992). The Fifth Circuit held that such a finding by the district court was substantively tantamount to a finding that the expert evidence proffered in opposition to the summary judgment motion was *inadmissible*. *Benavides v. County of Wilson*, 955 F.2d 968, 971 (5th Cir. 1992). In the present case too then, the district court, in finding that Newport failed to offer any proof on the issue of damages, necessarily found the expert opinions offered by Newport on the subject to be inadmissible.

Newport's assertion that the district court's finding on summary judgment was based on the "sufficiency" of the evidence rather than the admissibility of the evidence ignores not only *Benavides*, but also the express language used by the district court. Specifically, the district court found that Newport failed to

offer *any* proof of its alleged damages, despite the fact that Newport did offer expert opinion evidence in response to Sears' motion for summary judgment. Consequently, the district court necessarily found that the expert evidence offered by Newport in response to Sears' motion for summary judgment was inadmissible.

The Fifth Circuit, in violation of *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, _____ U.S. _____, 113 S.Ct. 2786 (1993), as well as *Benavides*, and in a flagrant abuse of its discretion, literally closed its eyes to the district court's express finding that Newport failed to present any "proof," direct or circumstantial, of its damages. Contrary to the Fifth Circuit's characterization, the issue was not the sufficiency of the evidence offered by Newport in response to Sears' motion for summary judgment because the district court found a *complete failure* of evidence on damages. In order to reach that conclusion, the district court necessarily in substance excluded the evidence proffered by Newport on damages. Clearly, then, the Fifth Circuit's putative "correction," which Newport concedes was made in response to Sears' Petition For Rehearing and Suggestion for Rehearing *En Banc*, simply, and apparently deliberately, ignored the district court's findings on the admissibility of the expert opinion evidence offered by Newport.

It is clear that the Fifth Circuit ignored the issue of the admissiblility of the expert opinion testimony offered by Newport, an issue which the district court itself recognized, as *Daubert* held, it was duty-bound to consider. In order to reach that conclusion, the Fifth Circuit necessarily disregarded the district court's finding that Newport failed to offer any proof of its damages. Newport's assertion that the Fifth Circuit's "pronouncement" regarding the admissibility of Newport's damages evidence rings hollow when viewed in proper context. As Sears pointed out in its Petition, the district court correctly performed its gatekeeper function, as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, _____ U.S._____, 113 S.Ct. 2786 (1993). The Fifth Circuit should not be permitted to simply wave its hand at this controlling law by misstating the substance of the district court's ruling.

CONCLUSION

For each and all of the reasons set forth above, as well as the reasons set forth in Sears' Petition, Petitioner respectfully requests this Court to issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of appeals for the Fifth Circuit be reversed.

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